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SECURITY AGAINST WAR

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VOLUME II

ARBITRATION, DISARMAMENT, OUTLAWRY

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VOLUME II

ARBITRATION, DISARMAMENT OUTLAWRY

CHAPTER XXIV

THE COURT OF INTERNATIONAL JUSTICE

Among the schemes for international peace and justice embodied in the Treaty of Versailles, a court of justice seems to have occupied an unimportant place.[1] It might have been forgotten during the deliberations of the Peace Conference, but for Viscount Cecil, who is reported to have drafted the first plan and to have won Mr. Wilson to the idea. The first draft provided that there should be a judicial body, "*i. e.*, the existing Hague organization with any additions or modifications made by the League."[2]

Mr. Wilson, however, disapproved of the form of this plan, and the Commission of the League of Nations, of which he was President, prepared the following draft:

"The executive council shall formulate plans for the establishment of a Permanent Court of International Justice and this Court shall, when established, be competent to hear and determine any matter which the parties recognize as suitable for submission to it for arbitration under the foregoing article."

When the Draft Covenant was made public on February 14th, 1919, Mr. Root at once realized that no provision had been made for constructing a foundation of law under the proposed tribunal. In a letter to the Chairman of the National Republican Committee, a copy of which he sent to Senator Lodge, he suggested an amendment in the form of an additional paragraph, as follows:[3]

"The executive Council shall call a general conference of the powers to meet not less than two years nor more than five years after the signing of this convention for the purpose of reviewing the condition of international law and of agreeing upon and stating in authoritative form the principles and rules thereof.

"Thereafter regular conferences for that purpose shall be called and held at stated times."

Mr. Root's proposal was rejected; but in the meantime, the Commission of the League of Nations made certain changes. The article, as finally adopted on June 28th, 1919, by the Peace Conference, read as follows:

[1] *A History of the Peace Conference of Paris,* Vol. VI; p. 487.

[2] Draft Covenant by Viscount Cecil, *U. S. Senate Document 106;* 66th Congress, First Session.

[3] *Congressional Record,* June 23rd, 1919; 66th Congress, First Session.

"ARTICLE 14. The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

These alterations eliminated all reference to the Hague Organization; confirmed the arbitral character of the Court; limited the approval of the plan to members of the League; and created a new function for the Court, namely, advisor to the League. They indicated that the Covenant and the Treaties of Peace were deemed to be a sufficient constitution and body of law. The Council was designated as the agent of the Principal Allied and Associated Powers to prepare plans for this institution of the League.

THE MANDATE TO THE COUNCIL

The League Council lost no time in carrying out the instructions of its principals. At its second session, held in February, 1920, a report on the organization of the Permanent Court was presented by M. Bourgeois (France), in which he stated that the court about to be established was already invested with certain definite powers by the Treaty of Versailles and the other treaties modeled upon it; and in order to give full effect to these stipulations and to curtail temporary measures, it was essential to form a Permanent Court immediately. In closing his report, he stated:[4]

"This instrument of the League of Nations, this Court, however composed, will be free from all national preoccupations, particularly the exercise of its sovereign jurisdiction: and the intervention of the Council or even of the Assembly, in the choice of its members will be calculated to remove all anxieties and guarantee against all attack the guardian principle of the equality of nations." * * * *

As stated authoritatively by M. Bourgeois, the Council was engaged in creating an instrument of the League. Lest there be any doubt, he again stated:[5]

"The Court can only function in a well-ordered cohesive world where there is a continuing mechanism for international co-operation and development. It must have close at hand a political organization, first to supply it with the law which it is to apply, and second, to give it the necessary authority and, if need be, sanctions.

[4] *Permanent Court of International Justice; Documents Concerning the Action Taken by the Council of the League of Nations under Article XIV of the Covenant;* p. 11.

[5] *The League of Nations Starts* (An Outline by Its Organizers, 1920); p. 79.

"Similarly, the League itself must have at hand a Court of law for the administration and interpretation of its laws and regulations. * * * The political phase of the League will be as dependent on the legal phase as the legal phase is on the political."[6]

Therefore, in the discussions of the Council, the proposed Court had no purpose other than to give effect to the stipulations of the Treaty; nor was it to be anything but an "instrument of the League."[7] He also made it clear that the intervention of the Council and Assembly was to be exercised in the choice of judges; thereby indicating that the Council from the beginning intended to name the judges.

THE ADVISORY COMMITTEE OF JURISTS

The Committee, as finally selected, consisted of the following: M. Adatci (Japan), M. Raphael Altamira (Spain), M. Clovis Bevilaqua (replaced by M. Fernandez) (Brazil), Baron Descamps (Belgium), M. Francis Hagerup (Norway), M. Albert de Lapradelle (France), Dr. Loder (Netherlands), Lord Phillimore (Great Britain), and M. Arturo Ricci-Busatti (Italy). To this list the Secretary-General proposed to the Council that it add Mr. Root's name. In approving the recommendation, Lord Balfour said that Mr. Root, for one reason or another, might not find it possible to accept, but the Council desired to put on record the fact that he would always be welcome to add to its deliberations the great weight of his learning and of his name.[8] Mr. Root accepted the invitation and was accompanied by Dr. James Brown Scott as Legal Advisor, both acting in their private capacity as American citizens.[9] Baron Descamps was elected chairman of the Committee.

[6] There is no higher authority than M. Bourgeois; for he was the first President of the Council, and guided the course of the draft statute.

[7] In view of the discussion taking place in the United States concerning the separation of the Permanent Court from the League, the intention of the signatories to the Treaty and of the members of the Council is of significance, as indicating the nature of the obstacles which such a proposal may possibly encounter.

[8] *Official Journal,* March, 1920; p. 37.

[9] In public discussions considerable stress has recently been laid upon the fact that the United States Government has failed to endorse the work of Mr. Root in not accepting the Court; implying a not strictly scrupulous behavior on the part of the Government. It should be pointed out that at the eighth session of the Council it was stated that the "jurists at The Hague had not acted as the representatives of their Governments," but "had attended without definite instructions and their decisions did not necessarily bind their Governments." (*P. C. of I. J., Documents Concerning the Action Taken by the Council;* p. 21.) This statement concerned members *designated* by their Governments, whose recommendations were rejected by other representatives of these Governments sitting

The League Council did not leave the Committee of Jurists in any doubt as to the nature of its task. In the communication inviting the jurists to serve, the Secretary-General of the League pointed out that they had been invited to prepare a plan for the Court which "is a most essential part of the organization of the League of Nations." [10] On the occasion of their first meeting, M. Bourgeois again made the matter clear when he stated:[11]

"May I be permitted to state why the Council of the League of Nations consider the two institutions as complementary the one to the other, as of necessity being organized at the same time and as being unable, as long as they wish to preserve their existence, to do without each other. * * * *

"Finally, there is a last point of view, which we must take in order to envisage the necessary relations between the League of Nations and the International Court of Justice, and the close solidarity which exists and which will always exist to an increasing degree between their two actions."

Nor was Mr. Root in doubt regarding the nature of the task. In a statement made before the Committee of Jurists on June 18th, 1920, he said:[12]

"Now, is it possible that the Council and the Assembly will accept and put into force the plan of the Court if the plan ignores their existence? How are courts constituted originally? However perfect may be the distinction between judicial and political powers, the personnel of the judiciary must necessarily have its origin in the political power."

And again, on June 22nd, 1920:

"We must first consider that this new court must be provided for as a part of the system of which the League of Nations is part. We cannot accept the invitation of the Council and recommend a plan for a court which is not going to form a part of that system."

M. de Lapradelle (France), *rapporteur* for the Committee, expressed a similar view when he stated: "The new court, being the judicial organ of the League of Nations, can only be created within this League."[13] From these views there was no dissent and the Committee

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in Council and Assembly. The tendency thus illustrated to identify the foreign policy of the United States with the honorable services of its private citizens in the political affairs of Europe detracts from both the distinction of their services and from the dignity of American foreign policy; and is misleading to European public opinion.

[10] *Official Journal,* March, 1920; p. 37.

[11] *Permanent Court of International Justice; Advisory Committee of Jurists; (Procès-verbaux* of the Proceedings of the Committee), pp. 9-10.

[12] *Am. J. Int. Law,* January, 1921; pp. 4 and 11.

[13] *Records of the First Assembly,* Committees, Vol. I; p. 420.

of Jurists proceeded to draft the statute for the judicial organ of the League System.

The Committee was in session at The Hague from June 16th to July 24th, 1920, during which time it prepared a Draft Scheme, consisting of 62 articles and comprising three parts: (1) organization; (2) competence; and (3) procedure.[14] In addition, it drafted three resolutions. On August 3rd, 1920, the Committee presented this Draft Scheme and the resolutions to the Council. They were accompanied by a report from the Secretary-General of the Committee, M. de Lapradelle, and were introduced in an address by M. Bourgeois.[15] The Committee considered it no part of its duty to urge the Council to accept either the Draft Scheme or the resolutions.

The Council, upon receiving the draft, appointed a committee of three, of which M. Bourgeois was invited to serve as chairman. The Secretary-General sent a letter to member states, enclosing a copy of the Draft Scheme, but discouraged them from making suggestions on the ground that it had been prepared by able jurists and the adoption of the proposal should not be imperilled.[16] When the Council met in Brussels from October 20th-28th, 1921, M. Bourgeois submitted a preliminary report, recommending certain modifications. After considerable discussion, these changes were embodied in a second draft, which the Council referred, along with other suggestions from certain governments, notably Italy, Sweden, and Argentina, to the Third Committee of the Assembly.[17] This Committee, comprising thirty-seven members, appointed M. Bourgeois as chairman. It then created a subcommittee, composed of five of the jurists who sat as members of the Advisory Committee of Jurists and five representatives of states. They were charged with the duty of examining the various proposals and of making a final draft for the Third Committee to submit to the Assembly.[18]

Of the proposals made by the Committee of Jurists, the League of Nations rejected three and ignored a fourth. These include the subjects of advisory opinions, conferences on international law, a High Court of Justice, and the re-opening of the Academy of International Law at The Hague.

[14] *P. C. of I. J., Advisory Committee of Jurists;* p. 673, for text.
[15] *Ibid.;* pp. 693-749.
[16] *P. C. of I. J., Documents Concerning the Action Taken by the Council,* p. 26.
[17] *Ibid.;* pp. 45-50.
[18] *Records of the First Assembly,* Committees, Vol. I; pp. 275-617; Minutes of the Third Committee.

ADVISORY OPINIONS IN THE DRAFT SCHEME

Article 14 of the Covenant, in laying down the principles to guide the Council in the formation of plans for the Court, provided that: "The Court may [19] also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." In accordance with this provision, the Committee of Jurists drafted Article 36, reading as follows:

"Article 36. The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly.

"When the Court shall give an opinion on a question of an international nature which does not refer to any dispute that may have arisen, it shall appoint a special commission of from three to five members.

"When it shall give an opinion upon a question which forms the subject of an existing dispute, it shall do so under the same conditions as if the case had been actually submitted to it for decision."

When this question was under discussion in the Committee of Jurists M. de Lapradelle explained that it was intended to provide for a distinction between a dispute and a point, the former being an actual contest and the latter a theoretical question, and that this distinction made it advisable to follow a different procedure, and while a "point" might be considered by a small body of judges, an actual dispute would require the full bench. Mr. Root declared that he was "opposed to the Court's having the right to give an advisory opinion with reference to an existing dispute. In his opinion this was a "violation of all juridical principles." [20] Mr. Root's consent was won by the assurance contained in the last paragraph that when an actual dispute is the subject of an advisory opinion, it shall be rendered under the same conditions as if the case had been submitted for a decision.

The Committee of Jurists devoted a considerable part of its discussions to the matter of separating advisory opinions from judgments, and in its report to the Council, stated that whenever an advisory opinion was given which referred to an actually existing dispute, the opinion must not constitute a restriction upon the freedom of decision when

[19] The French text uses the word *donnera* as the equivalent of may, meaning shall or will. It does not use *peut,* the precise equivalent of may. As both texts are authentic, the French text appears to make jurisdiction obligatory, while the English text does not. In the Eastern Carelian dispute, the Court, however, indicated that it possessed and would exercise discretion in giving an advisory opinion when such action was in conflict with an established principle of international law. (Chap. XXIX, p. 560.)

[20] *Preparation of the Regulations of the Court* (Publications of the P. C. of I. J., Series D, No. 2); p. 390.

the matter came before the Court as a concrete case. The jurists held that the Court should not be bound by its opinion when the case came before it, otherwise the opinion ceased to be advisory, and they therefore recommended that a smaller body of from three to five members of the Court render advisory opinions. Foreseeing that actual disputes might be submitted to the Court for advisory opinions, the Committee stated:[21]

"Of course the Court can only take judicial cognisance of a case brought by the contesting parties, and not by the Council or Assembly; but if the parties have decided to bring it before the Council or the Assembly, they must not be surprised if the Council or Assembly refer the case to the Court. The Advisory opinion given by the Court, under such circumstances, would not have the force of a sentence binding upon the two parties. But the Court's decision would nevertheless have the moral force attaching to all its decisions; and, if the Council or Assembly adopt it, it would have the same wholesome effect on public opinion. Whenever, therefore, an existing dispute is in question, the Court must take its decision in the same manner as if an action had actually been brought before it, that is to say, a judge of the nationality of each of the contesting parties must be allowed to take his place on the Bench, if the parties request it, and the parties must be allowed to present all arguments and proofs just as in a case brought directly before the Court by them."

The Council made no alteration in this Article, but M. Bourgeois and the members of the Third Committee of the First Assembly did not wholly agree with the Committee of Jurists and the Council. They believed the distinctions made by the eminent jurists were impractical in operation, and that abstract questions and actual cases required no such exact differentiation. It appears also that the International Labor Office believed advisory opinions would be a valuable asset to its work and its Director suggested the following amendment:[22]

"The Court shall give an advisory opinion upon any question or dispute of an international nature referred to it by the Council or Assembly or by the Administrative Council of the International Labor Bureau or by the General Labor Conference."[23]

The Third Committee, however, shared the view of the framers of the Treaty, namely, that advisory opinions should be the special privilege of the Council and Assembly. It deemed this privilege essential to upholding the rights of these bodies under Articles 11, 12 and 13. Obviously, if only the Council or Assembly could obtain

[21] *P. C. of I. J., Advisory Committee of Jurists,* p. 731.

[22] Chap. XXVII, p. 520. For manner of application of advisory opinions to the International Labor Office.

[23] *Records of the First Assembly,* Committees, Vol. I; p. 563.

opinions which had the authority of the Court, but which were not binding like a judgment, then the states, to obtain such opinions, would, in each instance, more readily submit their disputes first to the Council. It would then be for the Council to exercise control over that dispute by framing the question for submission to the Court.

While this matter was under discussion, the sub-committee received several new proposals. One came from the Italian Council of Diplomatic Litigation, suggesting the omission of the Article as not being in conformity with Article 14 of the Covenant, in that the Committee of Jurists had exceeded its powers in making the distinction contained in the Draft Scheme.[24] The Argentine delegation proposed that advisory opinions should be given not only to the Council and Assembly but also upon matters referred by the governments of states composing the League.[25] To this suggestion Sir Cecil Hurst (Great Britain) objected on the ground that it might in an indirect way introduce obligatory jurisdiction or unilateral arraignment. The opinion expressed by the Italian Council prevailed and the drafting committee favored the suppression of the entire article, as drafted by the Committee of Jurists, on the ground that Article 14 of the Covenant contained a provision in accordance with which the Court could not refuse to give advisory opinions.[26]

It considered "that these opinions should be given with the same quorum of judges as that required for the decision of disputes" and that there was "no need to maintain the distinction established in this respect by the Draft Scheme." It further stated that the distinction made by the jurists seemed to be lacking in clearness and likely to give rise to practical difficulties; also that the Draft Scheme entered into details which seemed to concern the rules of procedure of the Court. In giving the reason for the rejection of the amendments proposed by the International Labor Office and Argentina the sub-committee considered that "such provisions would involve a considerable extension of the duties of the members of the Court and might lead to consequences difficult to calculate in advance."[27]

While the rejection of this Article leaves the Court Statute silent upon the grant of any authority for the rendering of advisory opinions, by implication Article 1 may be held to grant such authority, inasmuch

[24] *Records of the First Assembly,* Committees, Vol. I; p. 499.
[25] *Ibid.,* p. 519.
[26] The sub-committee was evidently following the French, not the English text.
[27] *Records of the First Assembly,* Committees, Vol. I; p. 534.

as it states that the Court is established "in accordance with Article 14 of the Covenant of the League of Nations." [28]

There remains the question whether the Court may exercise discretion in the rendering of such opinions. Upon this point, when the Court was considering the adoption of its regulations, Justice Moore observed as follows:[29]

1. "That the Constitution of the Permanent Court of International Justice contains no express provision on advisory opinions, an Article to regulate the giving of such opinions having been deliberately rejected.

2. "That, on consideration of the two official texts, Article 14 of the Covenant, where alone the subject is mentioned, cannot be regarded as imposing on the Court an obligation to render such opinions unconditionally and on request.

3. "That the giving of advisory opinions, in the sense of opinions having no obligatory character, either on actual disputes or on theoretical questions, is not an appropriate function of a Court of Justice.

4. "That the exercise of such a function is at variance with the fundamental design of the Permanent Court of International Justice, which was to advance the application between nations of the principle and method of judicial decision.

5. "That the emission, either on actual disputes or on theoretical questions, of opinions avowedly having no binding force, would tend not only to obscure but also to change the character of the Court.

6. "That the emission of such opinions would necessarily diminish the opportunities for the exercise by the Court of its judicial functions, since, if the opinions were treated by the Court as binding upon it, they would tend to preclude the subsequent submission of disputes for judicial decision, while, if treated as mere utterances and freely discarded, they would inevitably bring the Court into disrepute.[30]

7. "That the emission of such opinions would, for the same reasons, also tend to prevent the Court from performing what had been conceived to be one of its primary functions—that of contributing, through its jurisprudence, to the development of international law.

8. "That the rendering of such opinions would, so far as concerns the views or interests of particular nations, involve all the possibilities of prejudice which led to the insertion in the statute of the clause providing for the intervention of governments in pending litigation.

9. "That it is not desirable that the Court should seem to invite requests or applications for 'advisory opinions.'

10. "That, taking into account the various phases of the subject, it may

[28] The amendment proposed to Article 1 in Senator Pepper's resolution of May 22nd, 1924, would leave the Court without authority in its own Statute to deliver advisory opinions to the Council and Assembly. (Chap. XXXV; p. 678.)

[29] *Preparation of the Regulations of the Court,* P. C. of I. J., Series D, No. 2, p. 397.

[30] Chap. XXX; p. 581, wherein is described the manner in which this process may take place.

be preferable that there should be no special regulation concerning advisory opinions, but that, if an application for such an opinion should be presented, the Court should then deal with the application according to what should be found to be the nature and the merits of the case."

In accordance with this viewpoint, the Court adopted the following procedure, governing advisory opinions:

Art. 71. "Advisory opinions shall be given after deliberation by the full Court.

"The opinions of dissenting judges may, at their request, be attached to the opinion of the Court.

Art. 72. "Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council.

"The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

Art. 73. "The Registrar shall forthwith give notice of the request for an advisory opinion to the members of the Court, and to the members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant.

"Notice of such request shall also be given to any international organizations which are likely to be able to furnish information on the question.

Art. 74. "Any advisory opinion which may be given by the Court and the request in response to which it was given, shall be printed and published in a special collection for which the Registrar shall be responsible."

ADVISORY OPINIONS IN PRACTICE

Events, however, have fully justified the apprehensions of the Committee of Jurists and have revealed the wisdom of its proposal. Mr. Root's declaration that an advisory opinion violated all juridical principles when applied to actual disputes has been disregarded in six instances by the Council; in fact, a practice has been followed of submitting actual disputes, not by the parties for judgments, but by the Council for advisory opinions. The following questions have been submitted to the Court by the Council for an advisory opinion:[31] (1) The Appointment of the Netherlands Delegate to the International Labor Conference; (2) Competence of the International Labor Organization Concerning Agricultural Workers; (3) Concerning Methods of Agricultural Production; (4) Nationality Decrees in Tunis and Morocco;

[31] The only instance where the Assembly has been requested to obtain an advisory opinion from the Court concerns the Council, wherein Lithuania requested that the Fourth Assembly place on its agenda the question whether the Council had exceeded its authority under the Covenant. (Chap. XXX, p. 624.)

(5) Autonomy in Eastern Carelia; (6) German Settlers in Poland; (7) Acquisition of Polish Nationality by German Settlers; and (8) the Polish-Czechoslovak Frontier. The first dispute concerned the sovereign right of the Netherlands Government to exercise its discretion in selecting delegates to a labor conference; the fourth affected the rights of citizens; the fifth concerned the interpretation of a treaty; the sixth affected the property rights of settlers; the seventh related to citizenship rights under a treaty guarantee and the eighth involved a boundary line. In but two instances has the opinion dealt with a theoretical question, and even these involved actual disputes over the methods of administering the International Labor Office.

It will be recalled that the Committee of Jurists placed emphasis upon two points. The first was that the statute should distinguish between theoretical questions and actual disputes. The Council reaped the fruits of its rejection of this provision when M. Salandra (Italy) opposed the submission of the theoretical questions arising from the Italo-Greek dispute, on the ground that they might come before the Court subsequently as actual cases for decision.[32] In view of this contention, the Court was ignored and the questions were referred to a Special Commission of Jurists.

The Committee of Jurists also laid down the principle that whenever an actual dispute was the subject of an advisory opinion it should be heard precisely as though it were such a case. This principle has been applied as to a full bench hearing the case, but not as to the interested parties having a national on the bench. In the matter of the Netherlands delegate this right was not in question, since that country has a national in the President of the Court.[33] Similar conditions prevailed in the matter of the Nationality Decrees wherein Great Britain and France were interested. But in the matters affecting the property and nationality rights of the German settlers in Poland, neither the settlers nor Poland had a national on the bench, and in the matter of the Polish-Czechoslovak frontier, neither state had a national on the bench. It is therefore apparent that an inequitable situation exists as between states having a national on the bench and those which have not, in the event that the established practice continues of submitting actual disputes for advisory opinions.

Attention has been called to the fact that it is the practice to submit

[32] Chap. IX, p. 227. It will be noted that the Council departed from its usual rule and did not consult the Assembly, then in session, as to this method of interpreting the Covenant.

[33] For details of disputes, consult the various chapters.

actual disputes for advisory opinions. Why have the members of the League, the Conference of Ambassadors, and the Council resorted only to advisory opinions in the determination of their disputes, the only exception being where Germany was concerned? The answer probably lies in the nature of the advisory opinion. In the first place, the submission of the dispute in this form enables the Council to retain full control over the dispute and a measure of control over the Court. It is frequently pointed out that the League exercises no control over the judgments of the Court. Technically this statement may be held to be within the bounds of accuracy; but practically such is not the case. The Council has exercised control over eight out of the nine questions submitted to the Court. In framing the question, in separating what it deems to be the political from the legal questions in the submission of matters to the Court, the Council controls the issue in a manner to either limit or extend the competence of the Court to deal with the merits or any aspect of the case. It is, of course, wholly unnecessary to influence the *opinion* of the Court if the question submitted can be so phrased and hedged about that a resolution of the Council can impose such precise demarkations between political and legal questions that the Court is allowed little or no latitude in the actual settlement of a dispute. Furthermore, it should be fully apprehended that in rendering an advisory opinion, the Court settles no dispute; all that it does is to give legal advice on points submitted to it by the Council which is endeavoring to settle the dispute. The opinion, therefore, is but a link in the process of political mediation undertaken by the Council—a link which the Council may circumscribe, modify, accept or reject in considering the whole chain of circumstances.

In the second place, when a Court renders a judgment, its form is ordinarily such that it carries with it the *terms* of its own execution. This is precisely what occurred in the Wimbledon Case.[34] But in an advisory opinion, a political body is interposed between the Court's opinion and its execution. This gives to the Council wide discretion in the application of that opinion. Thus in the case of the German settlers, the Court was of the opinion that Poland had violated the provisions of the Minority Treaty in evicting German settlers. But the Council held that the reparations for this eviction need not be the *reinstatement* of the settlers but *money compensation.* It is possible that the Court might have held a different view of the reparations had it been permitted to indicate their nature and that Poland's threat that

[34] Chap. XXXII, p. 608.

it would not reinstate the settlers might have had less weight with a judicial than with a political body.

In the third place, the advisory opinion enables the Council to retain its hold over its members. It will be recalled that the Council was opposed to compulsory jurisdiction on the ground that it would give the Court priority over the Council, it being the theory that a member should first submit its dispute to the Council under Articles 12, 13 or 15 of the Covenant. At the close of five years, this hold over members remains unbroken. No member state has yet been able to reach the Court directly, though some have tried.[35]

Lastly, an advisory opinion, while carrying with it the weight of a legal opinion, does not subject the parties to any degree of moral obloquy when it is disregarded as would a judgment of the Court. A state would find little acceptable excuse in public opinion for disregarding a judgment of the Court wherein the parties alone were held responsible, but Poland found it possible to disregard the advisory opinion of the Court to the effect that its eviction of German settlers was in violation of the Minority Treaty, by reason of the fact that the opinion of the Court is part of a process of conciliation in which the Council is still engaged and such disregard is condoned by the Council itself.

In view of the use made of advisory opinions to deflect justice in the interests of political expediency and to relegate the Court to an inferior position in its relation to nations and disputes, the question arises whether such opinions should not be abolished as constituting an obstruction to justice and to peace. May the Court, as intimated by Justice Moore, decline to render an advisory opinion when an actual dispute is involved? If so, the responsibility rests there. But in the opinion of the writer, the actual capacity of the Court to affect the issues of peace and war will be largely conditioned by the freedom of

[35] The submission to the Court of an application from the Greek Government relating to claims of a Greek subject in Palestine with regard to contractual rights was made under Article XXVI of the Palestine Mandate, under which it was agreed:

"That, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice."

This action therefore constitutes no exception to the above statement, and it may be of interest to note that Great Britain is reported to be contesting the jurisdiction of the Court. The matter was before the Court at its June session and the record is not yet available.

the Court to render judgments in actual cases in lieu of advisory opinions given to the Council.

INTERNATIONAL LAW

When the first draft of the Covenant appeared it will be recalled that Mr. Root submitted through the State Department an amendment providing for the calling of international conferences for reviewing the condition of international law and for agreements upon its principles and rules.[36] At about the same time he wrote a letter to Senator Lodge in which he stated:[37]

"International law is not mentioned at all except in the Preamble; no method is provided and no purpose is expressed to insist upon obedience to law, to develop law, to press forward agreement on its rules and recognition of its obligations. All questions of right are relegated to the investigation and to recommendation of a political body to be determined as matters of expediency."

It was but natural that Mr. Root, being a member of the Advisory Committee of Jurists, should interest that body in remedying this obvious defect. In July, 1920, therefore, he renewed his efforts to construct a foundation of law under the proposed court. He was so far successful that the Committee submitted to the Council a resolution which provided as follows:[38]

"The Advisory Committee of Jurists, assembled at The Hague, to prepare the constituent Statute of a Permanent Court of International Justice;

"Convinced that the extension of the sway of Justice and the development of international jurisdiction are urgently required to ensure the security of States and well-being of the Nations, recommend that:

"I. A new inter-State Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible for the purpose of:

"1. Re-establishing the existing rules of the Law of Nations, more especially and in the first place, those affected by the events of the recent war:

"2. Formulating and approving the modifications and additions rendered necessary or advisable by the war; and by the changes in the conditions of international life following upon this great struggle;

"3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy;

"4. Giving special consideration to those points which are not at the

[36] This amendment was transmitted to the Peace Conference through the State Department and had the endorsement of the Executive Council of the American Society of International Law and of a committee of eminent members of the American Bar.

[37] *Congressional Record,* June 23rd, 1919; 66th Congress, First Session.

[38] *Records of the First Assembly,* Committees, Vol. I; p. 462.

present time adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

"II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work.

"III. That the New Conference should be called the Conference for the Advancement of International Law.

"IV. That this Conference should be followed by periodical similar Conferences, at intervals sufficiently short to enable the work undertaken to be continued, in so far as it may be incomplete, with every prospect of success."

The resolution, as it came from the Advisory Committee of Jurists, was an extraordinarily explicit document. It expressed the belief that the way to justice, to security and to the well-being of nations was by way of law. It proposed to carry forward the work of the Hague Conferences. It sought to establish a real, vital, unequivocal international law; to formulate the modifications and additions made necessary by the war and by the changes in international life which are following the war; to reconcile divergent opinions and bring about understanding; and to provide for matters not yet incorporated in international law. The Committee then suggested a practical plan and named the institutions it thought might undertake preliminary plans; and, finally it provided for periodical conferences.

When the Advisory Committee incorporated the second clause, inviting the five international law organizations to co-operate in the codification, it took the most progressive step possible to accomplish a task of this character. The proposal contained the assurance that a codification to be kept free from political influences, could best be made by having societies of this kind, scholastic in composition and uninfluenced by the current of international intrigue, direct the work.[39]

When the proposal of the Advisory Committee of Jurists came before the Third Committee, M. Politis (Greece) observed that this work had to be performed by steps, the first of which was to invite the Council to constitute a committee for the preparation of draft conventions. He

[39] The Pan-American Republics in their desire to obtain a codification of international law, independent of political influences, requested through the Pan-American Union on January 2nd, 1924, that the American Institute of International Law submit the results of its deliberations to the International Commission of Jurists at its meeting at Rio de Janeiro in 1925. (See also Chap. XXXV; p. 663.)

considered that when the Council received these conventions, it would ask the Court for an opinion and would then add its own opinions from a political viewpoint.[40] M. Huber (Switzerland) was of the opinion that such conferences as the Committee of Jurists proposed might interfere with the right of the Assembly to bring about conventions on special subjects under Article 21.[41] It was the general opinion of the Third Committee that it would be impossible to distinguish between legal and political considerations in international law; and that the question was not one of codification of great principles of international law, but rather the definition of the basic laws of the League of Nations. The Third Committee decided to substitute for the recommendation by the Advisory Committee of Jurists, a request to the General Assembly to pass the following recommendation:[42]

"The Assembly of the League of Nations invites the Council to address to the most authoritative of the institutions which are devoted to the study of international law a request to consider what would be the best methods of co-operative work to adopt for the more precise definition and more complete co-ordination of the rules of international law which are to be applied in the mutual relations of states."

The Committee of Jurists was specific as to subject, procedure and purpose. But the Third Committee of the First Assembly did not propose to yield even the shadow of its ultimate authority over codification, and the Assembly was requested to pass as a substitute the above invitation to unnamed organizations containing a request to consider methods to adopt to define a co-ordination of rules of law to be applied to the mutual relations of states.

In support of this substitute resolution, the Third Committee observed:[43]

"That the Assembly of the League of Nations is, in reality, itself continuing this work [the work of the Hague Conferences], and that it would be superfluous to establish an additional organization made up in the same way."

The Assembly, however, was also adverse to taking any risks with its own rights. Viscount Cecil sounded the retreat from the Hague Convention of 1907 when he addressed the Assembly as follows: [44]

[40] *Records of the First Assembly,* Committees, Vol. I; p. 327.

[41] The only specific proposal considered by the Assembly under Article 21 within a period of four years to improve international law appears to have been during the Bolivian-Chilean dispute concerning the revision of treaties, where action was opposed on the ground that to take any such action except on invitation to the signatories would create a dangerous precedent. (Chap. XX, p. 375.)

[42] *Records of the First Assembly,* Committees, Vol. I; p. 589.

[43] *Ibid.* p. 588.

[44] *Records of the First Assembly;* pp. 745-46.

"I venture to hope that this recommendation will not be proceeded with at present. To my mind, we have not got to a stage yet where it is desirable to consider the codification of international law. This is really the first step towards codification. It is a request, unless I have misunderstood it, to a variety of learned societies to devote their attention to the codification of international law. I think that a very dangerous project at this stage in the world's history. I hope that we shall not proceed with it at the last moments of this Assembly, or without very much more consideration."

The Assembly then rejected the resolution. Thus was halted the persistent fight for the settlement of disputes by means of international law. It was begun at the Hague Conference of 1899 and won in 1907; continued when the Covenant first appeared, and lost; and revived in the Committee of Jurists, and won. The proposal was mutilated in the Third Committee and killed outright in the Assembly under the leadership of the representative of Great Britain.

Since that time, the Council has been engaged in negotiating or promoting conventions among the several states, dealing with special subjects, among which may be mentioned: A convention relating to the regulation of Aërial Navigation, signed at Paris, October 13th, 1919; International Convention for the Suppression of the Traffic in Women and Children, Geneva, September 30th, 1921; Convention and Statute on Freedom of Transit, Barcelona, April 20th, 1921; Convention and Statute on the Regimé of Navigable Waterways of International Concern, Barcelona, April 20th, 1921; Additional Protocol to the Convention on the Régime of Navigable Waterways of International Concern, Barcelona, April 20th, 1921; the Convention for the Control of the Trade in Arms and Ammunition and Protocol, signed at Saint-Germain-en-Laye, September 10th, 1919; also several International Labor Conventions.

Some of the advocates of these conventions have advanced the claim that they are building up a body of law which will accomplish the same ends as the rejected resolution. It is true, they are building up a body of law, but they are doing it without reference to the principles of international law of the present or past. In these conventions, questions of local interest have influenced the delegates in the provisions they have written into them or fundamental questions of international law have given way to expediency and to the particular foreign policy of the country of the delegate. If this theory of codification is to be extended to the principles and fundamental policies, which are the most likely to cause war, the centuries of growth in international law may be for naught, and the mighty nations at

the Conference table will be able to impose their will upon the smaller Powers in disregard of the principle that the smaller nation is as much entitled to the protection of international law as its larger neighbor.

These conventions are, with the exception of the Convention relating to the regulation of Aërial Navigation, without particular reference to peace and security, and the Aërial Convention was virtually without precedent in international law. While conventions may be advisable for these topics, it is doubtful if they should be extended by this process to the fundamentals of the law of nations where security is involved.

In addition to these conventions, several international conferences have been held, the results of which have been binding only upon the Powers which have sent representatives and ratified the recommendations. The London Naval Conference in 1908-9 made its comprehensive Declaration concerning the Laws of Naval War at that time. Representatives of the United States, Great Britain, France, Italy and Japan drew up a series of rules for the future use of wireless and air craft at The Hague in 1923, being an outgrowth of the Washington Conference for the Limitation of Armaments.

In none of these conferences were all of the adherents of the Covenant of the League of Nations or of the Protocol of the Permanent Court of International Justice represented. Yet, what the conventions recommended and adopted were binding on the states represented and two of them are international law in vital matters where there should be a definite understanding of just what the law is in reality.

The present situation is not particularly reassuring to the cause of international peace and justice. The proposal of the Committee of Jurists to codify international law was defeated on the theory that the Assembly would undertake this function. It has not done so. The Council has substituted itself for the Assembly and the Secretariat of the League is busily engaged in promoting miscellaneous conventions which range from white slavery to transit. The Council has established the principle that it, not the Court, will interpret the Covenant with the aid of Committees of Jurists, while the Conference of Ambassadors seems unwilling to entrust the interpretation of the Peace Treaties to the Court. These legal reticences and miscellaneous activities do not meet the situation which the Committee of Jurists had in mind nor are they conducted by disinterested legal experts in an atmosphere detached from political expediency or nationalist competition. No adequate substitute has been provided for the defeated proposal, and progress in the codification of law awaits both the legal

procedure and the spirit of disinterested research offered to the League in 1920.

ACADEMY OF INTERNATIONAL LAW

The Advisory Committee of Jurists made a third recommendation, as follows:[45]

"The Advisory Committee of Jurists assembled at The Hague to prepare the constituent Statute of a Permanent Court of International Justice;

"Gladly takes this opportunity of recording a unanimous wish that the Academy of International Law, founded at The Hague in 1913, and of which the work has been suspended owing to circumstances, may be set in operation in as near a future as possible, side by side with the Permanent Court of International Justice and the Permanent Court of Arbitration, at the Peace Palace at The Hague."

The Third Committee reported that as this institution was based on private initiative it did not require a special resolution and it would be sufficient to acknowledge its mere existence. In this point of view the Assembly concurred. This Academy was reopened in July, 1923, but not through any effort of the League of Nations.

A HIGH COURT OF INTERNATIONAL JUSTICE

Exclusive of the Court Statute, the Committee of Jurists made one other forward-looking recommendation, which the League rejected. Baron Descamps (Belgium), the President of the Committee, proposed the creation of a High Court of International Justice to try international crimes; and a resolution was adopted recommending that the Council and Assembly consider the proposition, which was formulated in the following terms:[46]

Art. I. "A High Court of International Justice is hereby established."

Art. II. "This Court shall be composed of one member for each State, to be chosen by the group of Delegates of each State on the Court of Arbitration."

Art. III. "The High Court of International Justice shall be competent to try crimes constituting a breach of International Public Order or against the universal Law of Nations referred to it by the Assembly or by the Council of the League of Nations."

Art. IV. "The Court shall have the power to define the nature of the crime, to fix the penalty and to decide the appropriate means of carrying out the sentence. It shall formulate its own rules of procedure."

As discussed by Lord Phillimore (Great Britain), crimes which might be considered by such a court would include those committed

[45] *Records of the First Assembly,* Committees, Vol. I; pp. 494-95.
[46] *Records of the First Assembly,* Committees, Vol. I; p. 494.

in times of peace, in times of war or in declaring unrighteous war. He believed for crimes in time of peace a competent national jurisdiction already existed. He pointed out that the two Conferences at the Hague have written rules regarding the conduct of war on land and sea and with regard to the position of prisoners and the subjects of occupied territory, disobedience to which might well be considered to form a crime in which the Court might, by analogy to proceedings in impeachment cases, settle for itself the proper punishment. He said, however, that:[47]

"A matter which would require much thought is the execution of judgments rendered by an international criminal court. If the sentence be of death, who is to be the executioner? The international court must sit in some country or other; and then will the national law permit an execution except in sentences by its own courts and by its own officers? Or is the nation to be called upon to put its services at the disposal of the international court? If the sentence is of imprisonment, where is the prison? It might perhaps be made a term of the convention, establishing the court, that each state should agree to deal with its own peccant subjects. It could fine them and perhaps imprison them, as the court should direct, but it would be difficult to get it to agree to an execution by its own officers, and if it did agree, to get it to carry out its agreement."

The President of the Committee of Jurists pointed out that the subject of establishing such a court had been discussed at the Peace Conference, but that its proposal had been intended as an *ex post facto* application, whereas the proposed court would deal entirely with future conditions and with offenses against international public order and the universal law of nations. It was thought that its mere existence would have a beneficial influence in preventing crimes which provoke war and that the Committee of Jurists should take the initiative in laying down the principles of organization for such a court.[48]

Mr. Root appears to have been in sympathy with this project, saying that he "had long felt that it would be desirable to establish an understanding between civilized nations as to how crimes against universally recognized principles of humanity, justice and morality should be dealt with."[49] He pointed out that "unless there is a law to be broken there can be no penalty for breaches of it. As only states are subjects of International Law, an individual can only be punished if the act which he has committed is punishable according to the national law which applies to the case, that is to say, if the act, which

[47] *British Year Book of Int. Law,* 1922-23; p. 84.
[48] *P. C. of I. J. Advisory Committee of Jurists,* p. 129.
[49] *Ibid.,* p. 505.

constitutes a breach of the law of nations, also affects the welfare and dignity of the country whose law is applicable." [50] Therefore, the question, he thought, transformed itself into one of sovereignty, as to how far a given state would allow representatives of another sovereign state to punish acts committed in the former's territory. He said:[51]

"An official who obeys his government may, in a given case, be considered by the League of Nations as having committed an offense against International Law. If this opinion were upheld, the authority of the League of Nations would supersede the sovereignty of the State, and, so long as the only authorization for this is based on general principles, it is inadmissible. Cases must be clearly defined, otherwise a 'super-state' would be created—a great central authority exercising its power over states which, up to that time, had been independent."

Mr. Root distinguished between acts for which states accept responsibility and those disowned—the first giving rise to relations between states, while persons responsible for the latter are deprived of the protection of their Government; therefore, it would be necessary to create an obligation binding on all states to extradite accused persons, and the tribunal would be set in operation by communications from governments of sovereign states to the effect that a person had committed acts repudiated by his Government; [52] and that the authority used should be that of the state and not of a "super-state." He, therefore, suggested that the question be referred to the Conference for International Law, as proposed by the Committee. The Advisory Committee, however, adopted the plan in the form of a resolution recommending the consideration of the creation of a High Court of Justice as presented by Baron Descamps.

The proposal was referred by the Assembly to the Third Committee, which made short work of it, deciding that it would be useless to establish a criminal court side by side with the Court of International Justice, and that it was best to entrust criminal cases to the ordinary tribunals as is at present the custom of international procedure.[53] It was their view, if in the future it was feasible to try crimes of this character, which were within the scope of an international penal

[50] *P. C. of I. J., Advisory Committee of Jurists,* p. 505.

[51] *Ibid.*

[52] Had the High Court of Justice, as envisaged by Mr. Root, not been rejected by the League, the practice of states resorting to insincere disavowals in order to keep territory taken by their nationals would hardly have prevailed. Thus, the disavowal by Poland of General Zeligowsky; by Hungary of its military bands in the Burgenland; by Italy of d'Annunzio; and by Lithuania of M. Simonaitis, would have been forestalled in 1920 by the acceptance of this principle by the League.

[53] *Records of the First Assembly,* Committees, Vol. I; p. 589.

law, that a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem was thought at the moment to be premature; and the project has not been revived.

There can be little doubt from the negative point of view that the Council executed faithfully the instructions of its principals, the Allied Powers, as formulated at the Peace Conference at Paris. It instructed its Advisory Committee of Jurists to prepare a draft scheme for an organ of the League in accordance with Article 14 of the Covenant. When that Committee submitted a proposal for advisory opinions, segregating actual cases; when it proposed to codify international law; when it submitted a plan for a High Court of Justice; and when it sought recognition for the Academy of International Law, these proposals were deemed to be beyond the scope of Article 14 as tending to promote rival institutions or activities to the League or diminish the authority of the Council, and they were, therefore, summarily and unqualifiedly rejected.

CHAPTER XXV

THE EVOLUTION OF THE COURT STATUTE

The Advisory Committee of Jurists presented to the Council a draft scheme for the organization of the Permanent Court of International Justice. It is the purpose of the present discussion to analyze and compare the evolution of the scheme, as conceived by the eminent jurists, into the statute, as adopted by the League of Nations, together with such reasons for the changes as the record contains.

GENERAL JURISDICTION OF THE COURT

The Committee of Jurists was of the opinion that it was to construct a court of justice and to that end adopted the following text, which was recast as indicated by the Assembly:

Draft Scheme	*Present Statute*
Art. 31. "The Court shall have jurisdiction to hear and determine suits between states."[1]	Art. 36. "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force."[2]

It will be observed that the language of the jurists was precise: *suits* between *states;* while that of the revised article was ambiguous and conformed more nearly to Article 14 of the Covenant in that it substituted *parties* for *states,* and *cases* for *suits.* In Article 34 of the present Statute, a party is defined as follows:[3] "Only states or members of the League of Nations can be parties in cases before the Court," creating another ambiguity as to the distinction between states and members of the League.[4]

The addition of the clause: "and all matters specially provided for in treaties and conventions in force," is, however, a matter which

[1] *P. S. of I. J., Advisory Committee of Jurists,* p. 673, for text of draft scheme.

[2] Annex II for text of present Statute.

[3] See p. 441 for discussion by Committee of Jurists.

[4] The question whether the League of Nations or any of its subsidiary organizations should be permitted to plead before the Court in order to present conclusions or lay stress upon certain points of view was discussed by the Committee of Jurists. It was of the opinion that by reason of the fact that the League may transform the composition of the Court itself it may in that manner sufficiently exercise its power. *(Records of the First Assembly,* Committees, Vol. I; p. 476.)

may eventually affect the character of the Court. Under this clause it appears that any two states or groups of states may enter into an agreement, laying duties upon the Court, without consulting the other signatories to the Protocol of Signature to the Statute. While it is for the Court to determine its own competence, nevertheless such interpretation is permitted a wide latitude under this clause. The Lausanne Treaty, negotiated by a few of the signatories to the Protocol of Signature to the Court Statute, furnishes an instance in point.

On July 24th, 1923, the Turkish Government made a Declaration Relating to the Administration of Justice in Turkey, which is contained among the documents of the Lausanne Treaty. The Declaration reads as follows:[5]

"The Turkish Government proposes to take immediately into its service, for such period as it may consider necessary, not being less than five years, a number of European legal counsellors whom it will select from a list prepared by the Permanent Court of International Justice of The Hague from among jurists, nationals of countries which did not take part in the war of 1914-18, and who will be engaged as Turkish officials.

"These legal counsellors will serve under the Minister of Justice; some will be posted in the city of Constantinople and others in the city of Smyrna. They will take part in the work of the legislative commissions. It will be their duty to observe, without interfering in the performance by the magistrates of their duties, the working of the Turkish civil, commercial and criminal courts, and to forward to the Minister of Justice such reports as they may consider necessary; they will be authorised to receive all complaints to which the administration of justice in civil, commercial or criminal matters, the execution of sentences, or the manner of application of the law may give rise, with a view to bringing such complaints to the notice of the Minister of Justice in order to ensure the strict observance of the provisions of Turkish law.

"Similarly, they will be authorised to receive such complaints as may be caused by domiciliary visits, perquisitions or arrests; moreover, these measures shall, in the judicial districts of Constantinople and of Smyrna, be brought immediately after their execution, to the notice of the legal counsellor by the local representative of the Minister of Justice; this official shall in such cases be authorized to correspond direct with the legal counsellor."

This Declaration was signed by the representatives of the Turkish Government. The states negotiating the Treaty of Lausanne are all members of the League, except Turkey and Russia. Acting in concert, and without consulting the other signatories to the Court Statute, they agreed that Turkey—a non-signatory—should lay upon the

[5] *Treaty Series No. 16,* H. M. Stationery Office, London.

Court the peculiar duty of recommending legal counsellors for local Turkish Courts.

The Court was in doubt about accepting this duty, but evidently concluded that under Article 36 it either should not or could not refuse. On October 26th, 1923, Ismet Pasha requested the President of the Court of Justice to draw up a list of candidates, in accordance with the provisions of the Declaration, as quoted above. The Court decided to comply and has instructed its President to request the highest legal authorities of Denmark, Spain, Norway, the Netherlands, Sweden and Switzerland to communicate to the Court the names of two nationals who are qualified to undertake the duties of legal advisers to the Turkish Government.[6] By this act the Court may be regarded as agreeing to intervene in the local affairs of a state in matters over which it has no judicial control, but which intervention is susceptible to the popular interpretation that these counsellors are officers of the Court.[7]

In justification of this extension of the jurisdiction of the Court, it may be said that in undertaking these miscellaneous duties it serves the ends of justice and of peace. Time alone can demonstrate whether this will be the effect or whether the Court will become burdened with sectional duties, imposed by treaties negotiated by a few states and which may have little to do with international affairs or peace. In the meantime, states which have under consideration adhering to the Court may question whether some amendment is not necessary prohibiting duties of a miscellaneous character, having nothing to do with suits between states or the settlement of international controversies, from being imposed upon the Court by some of the signatories without the consent of at least two-thirds of all the signatories.

COMPULSORY JURISDICTION

A characteristic of a court of justice, distinguishing it from other tribunals, is compulsory jurisdiction. This enables an aggrieved party to bring the other party before the court for a fair hearing of the dispute, and the court may render a judgment by default if the other party does not appear. This is a fundamental guarantee of equality before the law which enables the weaker or aggrieved party to obtain

[6] *L. of N. Monthly Summary,* December, 1923; p. 268.

[7] This question is of especial interest to the United States. Were it officially a member of the Court, it would be in the position of co-operating in selecting a list of legal counsellors to officiate in courts at the same time that a contest is being carried on in this country against these courts and in favor of capitulations, as a reason for the non-ratification of the Turco-American Treaty.

a remedy for alleged wrongs. The Committee of Jurists recommended that a Court with such jurisdiction be created, but the Assembly revised the Draft Statute. The two proposals follow:

Draft Scheme

Article 33. "When a dispute has arisen between states, and it has been found impossible to settle it by diplomatic means, and no agreement has been made to choose another jurisdiction, the party complaining may bring the case before the Court. The Court shall, first of all, decide whether the preceding conditions have been complied with; if so, it shall hear and determine the dispute according to the terms and within the limits of the next article."

Article 34. "Between states which are members of the League of Nations, the Court shall have jurisdiction (and this without any special convention giving it jurisdiction) to hear and determine cases of a legal nature concerning:

(a) The interpretation of a treaty;
(b) Any question of international law;
(c) The existence of any fact which, if established, would constitute a breach of an international obligation;
(d) The nature or extent of reparation to be made for the breach of an international obligation;
(e) The interpretation of a sentence passed by the Court.

"The Court shall also take cognizance of all disputes of any kind which may be submitted to it by a general or particular convention between the parties.

"In the event of a dispute as to whether a certain case comes within any of the categories above mentioned, the matter shall be settled by a decision of the Court."

Present Statute

Article 36. "The Members of the League of Nations and the states mentioned in the Annex to the Covenant may either when signing or ratifying the protocol to which the present Statute is adjoined, or at later moment, declare that they recognize as compulsory, *ipso facto* and without special agreement, in relation to any other member or state accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(a) The interpretation of a treaty.
(b) Any question of international law.
(c) The existence of any fact which, if established, would constitute a breach of an international obligation.
(d) The nature or extent of the reparation to be made for the breach of an international obligation.

"The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain members or states, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

In substance, the Draft Scheme provided that when diplomatic means had failed to settle a dispute, the complainant could submit the matter to *the Court which, first of all, would decide whether or not diplomatic means had been exhausted* and whether the case had been taken before any other tribunal. Not all disputes could be submitted by one party; they were to be limited to those of a legal

nature, the classes being enumerated. The great advance, however, was the proposal that *the Court and not the parties should have authority to decide whether the case was included within such classification.* In advocating the adoption of this proposal by the Committee of Jurists, Mr. Root pointed out that the Hague Conference of 1907 had made a Declaration embodying the principle of compulsory arbitration and declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, should be submitted without any restrictions; also, that it had approved of a draft convention for the establishment of a Court of Arbitral Justice.[8] Mr. Root laid emphasis on the word "justice" and said that the Conference of 1907 held an idea of a permanent court similar to that of the Committee. He considered further that the framers of the Covenant also had in mind the relationship between arbitration and judicial decision which had prevailed in 1907.

Article 34, therefore, provided that the Court might hear and determine, without any special convention, disputes between members of the League when such disputes were of a legal nature as defined in Article 13 of the Covenant. This proposal was not intended to bind states to submit controversies to arbitration without their consent, for the statute of the Court, when adopted, would constitute a convention to that effect. On this point, the Report of the Committee of Jurists stated:[9]

"Not only is it obvious that the constituent Statute of the Court can confer upon it the degree of competence, which the States drawing up the Statute, wish to give it, but also, in the opinion of the majority of the Committee, the grant of such powers, though perhaps not strictly in accordance with the letter of the Covenant, follows its spirit so exactly that it would seem a great pity, now that the Court is being definitely organized, not to complete the progress made by this last provision."

But if the Court was to be given such jurisdiction, the question arose: What rules were to be applied within the limits of this competence? The Committee of Jurists limited the rules to such as were embodied in conventions, to international custom so far as it is a common usage; to the general principles of law recognized by civilized nations; and to judicial decisions and teachings of the most highly qualified publicists. Thus, in putting forth the idea of compulsory jurisdiction, in a limited number of cases, the Committee provided safeguards, through the rules of law, which the Court should apply.

[8] *Carnegie Endowment for International Peace; The Proceedings of The Hague* Peace Conferences, 1907, Vol. I; p. 572.

[9] *Records of the First Assembly,* Committees, Vol. I; p. 448.

Mr. Root, however, was mistaken in thinking that the framers of the Covenant had this idea in mind. From the first, this proposal met with an unfriendly reception which came from high sources. For "this step in advance over the Hague Convention" encountered the hostility of the British and French Governments. On October 20th, 1920, at the Brussels meeting of the Council, Lord Balfour submitted a note which read, in part, as follows:[10]

"The first observation I have to make is that the scheme, with all its merits, goes considerably beyond the Covenant. Article 14 (by which the Council is directed to formulate and submit to the League the plans of the Permanent Court) clearly contemplates (a) that the Court has only to deal with disputes which are voluntarily submitted to it by the authorities concerned; and (b) that it has to give an advisory opinion on any dispute or question which the Council or Assembly may choose to submit to it. Evidently, the framers of the Article never intended that one Party to a dispute should compel another Party to go before the Tribunal; and this omission cannot have been a matter of choice, since the subject of compulsory arbitration has been before the legal authorities of the whole world now for many years. It has more than once been brought up for practical decision, and has always been rejected."

This note held that Article 14 should be applied as the framers of the Covenant intended, namely, as a court of voluntary arbitration; and expressed the belief that compulsory jurisdiction had already been conferred by the provisions of the Treaty of Versailles, in so far as the framers of the Treaty had deemed it necessary.

The French Government supported the view taken by the British Government, for in his report to the Council, in opposition to compulsory jurisdiction, M. Bourgeois stated:[11]

"The decision of the Permanent Court is being substituted for the decision which the Council should take on the question whether diplomatic methods of settlement have or have not been exhausted between the two Parties before their dispute comes before the Council and a decision of the Permanent Court is substituted for the free choice allowed to the Parties by the Covenant with regard to the question whether they shall lay their dispute before the Court, before another international tribunal, or before the Council of the League of Nations.

"This freedom of choice is given to Members of the League of Nations by Article 12 of the Covenant.

"We do not think it necessary to discuss here the advantages which would result from the system of compulsory jurisdiction proposed by the Committee of Jurists with regard to the good administration of international justice and the development of the Court's authority. But as in reality a

[10] *P. C. of I. J., Documents Concerning the Action Taken by the Council;* p. 38.
[11] *P. C. of I. J., Documents Concerning the Action Taken by the Council;* p. 47.

modification in Articles 12 and 13 of the Covenant is here involved, the Council will, no doubt, consider that it is not its duty, at the moment when the General Assembly of the League of Nations is about to meet for the first time, to take the initiative with regard to proposed alterations in the Covenant, whose observance and safe keeping have been entrusted to it. If, on a particular point, whose importance is clear to everyone, it were to propose such alterations, it would also be obliged to express its views with regard to many other alterations in the Covenant, which certain Governments have already stated that they intend to lay before the Assembly.

"At the present moment it is most important in the interests of the authority of the League of Nations that differences of opinion should not arise at the very outset with regard to the essential rules laid down in the Covenant on 28th April, 1919." * * *

Here in unmistakably plain language were set forth the reasons why Europe, instead of having a court of justice with a real jurisdiction, has in reality a court of arbitration, save only in a permanent personnel of judges.[12] The reasons may be summarized as follows: (1) the purpose of the Council to execute the mandate of the Peace Conference as that body intended; (2) the fear that the decision of the Court would be substituted for that of the Council to decide when a dispute had exhausted diplomatic methods and should go to the Court; (3) the fear that by granting to the Court compulsory jurisdiction, member states would no longer be free to resort first to the Council; (4) the apprehension that such jurisdiction would constitute an amend-

[12] Mr. Borchard, Professor of law at Yale University, has raised a question concerning the establishment of a permanent personnel of judges *without* compulsory jurisdiction, as follows:

"With respect to the effect of a fixed and permanent personnel on the disposition of nations voluntarily to submit questions to judicial settlement, certain facts warrant consideration. In the several cases which the United States has voluntarily submitted to the Permanent Court of Arbitration, we examined with the greatest care the records of the arbitrators nominated in order to determine whether by word or act they could be deemed ever to have harboured a sentiment or doctrinal view unfavorable to the United States. * * *

"It was only after we were satisfied of the personal and professional records of the arbitrators nominated, in respect of their disposition toward the United States, that the United States agreed to their appointment as arbitrators in the cases mentioned. Other nations doubtless entertain similar views of such matters. When, therefore, the time comes for the submission of one of our cases to the World Court, is it not clear that the presence on the Court of even a single judge, to whose views, personal or professional, we have reason to object, will deter us from submitting the case? The personnel of the arbitrators or judges is one of the strongest factors in inducing or preventing submission. The longer the Court sits, the more will the views of its judges become established and known. Any nation, therefore, having a national interest in sustaining a different view will hardly be disposed to submit its case to a judge or judges whom it will necessarily regard as biased."—(*North Am. Review,* July, 1923.)

ment to Articles 12 and 13 of the Covenant; and (5) that the prestige of the League would be impaired by the grant of too much authority to the Court.

In transmitting its conclusions in the form of a revised article, the Council stated that it did not wish to declare itself opposed to the actual idea of compulsory jurisdiction on questions of a juridical nature; and that it would have no objection to its consideration at a future time.[13] The Third Committee of the Assembly, after due consideration, agreed with the Council and reported to the Assembly an amended draft abolishing obligatory jurisdiction and substituting the optional clause.[14]

The reasons given by the Council for the rejection of compulsory jurisdiction hold out little hope of change, for they have revealed the Council as a reactionary body acting in its own self-interest to whom the exercise of power was apparently more important than was the prevention of war through a court of competent jurisdiction. The rejection of this proposal, and the discussion incident thereto, has shown a Council in competition with its own Court, jealous of its own prestige, and willing to restrict the Court in order that the Council might control the settlement of disputes through its submission of them on its own terms to the Court. This rejection was a repudiation of the progress made by the Hague Conference of 1907 when that body approved of a declaration in its favor and of the work of the Advisory Committee which incorporated the substance of the Declaration in the Draft Scheme. In effect, the Council appears to have sacrificed the right of the Court to judge in order to preserve the power of the Council to arbitrate; and to have substituted the vagaries of conciliation as practiced by the Council for the strict rules of law and procedure which govern a court. By this act political expediencey was elevated

[13] The Labor Administration of Great Britain and the Socialist Administration of France have both announced the intention to resort more freely to the League as a means of settling disputes. As these two states were primarily responsible for the defeat of the Root proposal, this opening left by the Council should enable them to take the initiative in a practical realization of their declarations.

[14] The rejection of compulsory arbitration had the effect of amending Article 1 of the Draft Scheme. The Committee of Jurists provided that parties should have *direct access* to the Court. The Third Committee of the First Assembly omitted the phrase "to which parties shall have direct access" on the theory that it was connected with the idea of compulsory jurisdiction and might alarm certain governments. The important thing, said the objectors, was to have the Statute adopted. (*Records of the First Assembly,* Committees, Vol. I; p. 334.) No states have had direct access to the Court except in the Wimbledon case, which is provided for under Articles 380-386 of the Treaty of Versailles, and concerns a non-member of the League.

above justice; and there was created neither a court of justice to which an aggrieved party may resort, nor an arbitral tribunal where the parties have a right to select their own judges. The League itself took no step forward; on the contrary, by this act it is regarded as having retreated to the rear of the Hague Conference of 1907.

THE OPTIONAL CLAUSE IN THEORY

When the optional measure proposed by the Council as a substitute was referred to the Third Committee of the First Assembly, certain small and neutral states which were in favor of the proposal contained in the Draft Scheme were in opposition. The substitute read as follows:[15]

Article 33. "The jurisdiction of the Court is defined by Articles 12, 13 and 14 of the Covenant."

Article 34. "Without prejudice to the right of the parties according to Article 12 of the Covenant to submit disputes between them either to judicial settlement or arbitration or to enquiry by the Council, the Court shall have jurisdiction (and this without any special agreement giving it jurisdiction) to hear and determine disputes, the settlement of which is by Treaties in force entrusted to it or to the tribunal instituted by the League of Nations."

This proposal in the course of the discussion was transformed into the optional clause which constitutes Article 36 of the present Statute, but not without a long and bitter debate between the small states and the great powers. In that transformation, reference to Articles 12, 13 and 14 was eliminated and the specific classification contained in the Draft Scheme was retained. Certain liberties, however, as to time and conditions of reciprocity are allowed to signatory states which introduce an element of instability into the compulsory jurisdiction granted to the Court by the parties under this clause.

This compromise, whereby compulsory jurisdiction was retained in the form of an optional clause, was necessary to the adoption of the Scheme by the Assembly, since unanimity could not have been obtained without the Great Powers which were opposed to compulsory jurisdiction, nor without the small powers which insisted upon its inclusion in some form.

When the Draft Scheme, containing this substitution for compulsory jurisdiction, was on the order of passage in the Assembly, nineteen speeches were made, of which twelve were emphatically in favor of the original proposal. The disappointment may be appreciated from the following excerpts taken from these addresses.

[15] *Records of the First Assembly,* Committees, Vol. I; p. 473.

Dr. Loder (Netherlands), now the President of the Permanent Court, said:[16]

"The Permanent Court of Arbitration at The Hague had been founded, and unsuccessful attempts had been made to agree on a Court of Arbitral Justice. All were agreed on a principle of the first importance. Here is the text of the declaration:

> " 'The Conference is unanimous:
> " '(1) In admitting the principle of compulsory arbitration;
> " '(2) In declaring that certain disputes, especially those relating to the interpretation and application of the provisions of international agreements, may be submitted to cumpulsory arbitration without any restriction.'

"This, I repeat, was in 1907.

"The ten jurists thought that twelve years after the vote of 1907 the idea of compulsory jurisdiction was now at last about to be realized. They examined Articles 12, 13 and 15 of the Covenant, which only provided for arbitration; they read Article 14, which constituted a Court; they observed that this Article no longer spoke of arbitration but of international justice, and they deduced from this that the great step forward had now been made. They believed that henceforth men could be sure that in the last resort justice would always be done, even against the will of those who might desire to impede it.

"They were mistaken.

"We, younger and more impetuous, have found ourselves at issue with the great States in the Council, older and perhaps wiser than we. They have deleted our Articles 33 and 34 and replaced them by the Articles that are before you; they have eliminated compulsory jurisdiction, even in the form we suggested, restricted and surrounded as it was by special safeguards.

"What have we done in the Committee? What are we about to do? We have yielded to your desires. We have yielded because we saw that fundamentally everyone was agreed on the third principle also.

"It has not been said that we were mistaken, that our system was wrong, that it was worthless, and that compulsory jurisdiction between States was impracticable.

"On the contrary, we were told, and I heard it in our Committee from Lord Robert Cecil and from Sir Cecil Hurst: 'Do not be anxious; we agree on principles; we hope that the day will come when your desires will be realized. But that day has not yet come; the time is not yet ripe to take such an important step forward. At present it would be dangerous to cite a State before the Court against its will.'

"Arguments based on Article 14 of the Covenant accompanied these assertions. I will not waste your time with juridical arguments which are now of secondary value. The real argument is the political one. 'The time is not yet ripe.' We replied by yielding our position. We said: 'You think that we are going too fast, and you have laid your hand on the reins to restrain us and to make us go more slowly. Well, we will go more slowly

[16] *Records of the First Assembly;* p. 444.

if you desire, even to the point of almost losing an opportunity of going forward. You desire that today shall be yours; today, therefore, shall be yours; but tomorrow will be ours!"

M. Lafontaine (Belgium) made the following observation:[17]

"The nations had another hope, namely, that recourse to international justice would be compulsory for all disputes. In this case also a minority of delegations has once more paralyzed the will of the majority. * * *

"I was astonished to hear those who once defended the principle of compulsory arbitration utter the words 'vital interests.' I heard proclaimed the absolute sovereignty of States. We were told that only the nations themselves were judges of their vital interests and that to recognize the right of a State to arraign another was a grave encroachment upon the sovereignty of States. This is not the moment to discuss these principles again. They are condemned by the general opinion of the world and of jurists."

M. Fernandez (Brazil) said:[18]

"It is paradoxical that a League whose object is the maintenance of peace should neglect to remove the cause of a whole category of disputes which are the most dangerous. * * *

"I would ask you to observe two contradictory facts. First, we have hastily organized the economic weapon of the blockade. This is a weapon of attack, a terrible and cruel one, and besides, it is not an equitable weapon when it is wielded by the League of Nations, which, as is readily seen, cannot turn it easily against all its Members. At the same time, we are going to abandon justice, an instrument of the peacemaker, which is conciliatory and impartial."

THE OPTIONAL CLAUSE IN PRACTICE

As apprehended by the small states, the benefits have not exceeded their expectations; for no dispute has been submitted under this clause. It is now four years since the clause was adopted and the following states have accepted its provisions: Austria, Brazil, Bulgaria, China, Costa Rica, Denmark, Esthonia, Finland, Haiti, Latvia, Liberia, Lithuania, Luxemburg, Netherlands, Norway, Panama, Portugal, Salvador, Sweden, Switzerland, and Uruguay. Of these, the Brazilian ratification is inoperative by reason of the condition imposed by that state, namely, that two of the permanent members of the Council should ratify.[19]

Of these twenty-one states, eleven have limited the duration of their ratification to five years, namely, Austria, Brazil, Bulgaria, China, Denmark, Finland, Lithuania, Luxemburg, Norway, Sweden, and Switzer-

[17] *Records of the First Assembly;* p. 447. [18] *Ibid.;* p. 452.

[19] *Annex to Supplemental Report to the Fourth Assembly,* Doc. (A) 10 (a) September 1st, 1923; and *Official Journal,* October, 1923; p. 1133.

land. When this period expires, if no Principal Allied Power has signed the optional clause, it is reasonable to believe that certain states will not renew their ratifications.

An examination of the signatory states indicates that no Principal Allied Power, no important militaristic state, no mandatory country and no states in such proximity as to have racial and territorial disputes have signed this clause. For instance, Lithuania is a signatory but its aggressive neighbor, Poland, is not; Bulgaria accepts but no Balkan state keeps it company; Austria has signed but the Little Entente and Hungary do not reciprocate; and among the states involved in the Great War, only Austria, Bulgaria, Finland and Lithuania have signed. The peaceful Scandinavian states, together with Finland, Esthonia, Latvia and Lithuania appear to constitute the only reciprocal combinations in Europe which agree to take disputes automatically to the Court. On the other continents, the efficacy of this clause, as a preventive of war, is not apparent. In Asia, China has signed but Japan has not, and China is alone in setting a good example. In Africa, Liberia is the only signatory; in South America, Uruguay is the only effective signatory;[20] and in North America, there is none. In Central America, the position approximates that in the Baltic, for Panama, Costa Rica, Salvador and Haiti have signed.

In theory, therefore, the optional clause was intended to protect smaller and weaker states from powerful predatory neighbors; it has failed because these same neighbors are in no mood for such restrictions. In theory, each of the signatory states confers compulsory jurisdiction upon the Court; in practice the signatories are territorially so distributed that states likely to have disputes are not brought within that jurisdiction. In actuality, during the two years and nine months of the life of the Court, it has not exercised any jurisdiction conferred by the optional clause; chiefly by reason of the fact that the states having disputes are not signatories.

THE PROTOCOL OF SIGNATURE

The substitution of the optional clause for compulsory jurisdiction raised in an acute form the question of the form of submission of the Draft Scheme to member states, as provided in Article 14. From the first, the Council contended that it should be the body to submit the draft to the member states and that the various state delegations, then

[20] The conclusion of the Pan-American Treaty indicates the tendency to settle South American disputes in the western hemisphere. (Chap. XXXV, p. 664.)

meeting as the Assembly, need not first adopt the scheme. This proposal met with protest from members of the Assembly who insisted that such a procedure would weaken the authority of the Assembly and would establish a harmful precedent. It was pointed out that such a procedure would create the impression that the Council was the real organ of the League, whereas the Assembly had the right to take a decision upon any matter within the sphere of the League and the creation of a court was within such a sphere. Also, it was insisted that an institution of the League could not be set up by a convention between some of its members without a vote of the Assembly as this would amount to depriving other members of the right to vote on the proposal—an inadmissible practice;[21] also it was pointed out that members take their decisions through the instrumentality of the Assembly. In this respect, the information was given that President Wilson had stated in an official letter to the Swedish delegates at Paris that the expression "members of the League in Article 14 should be understood as meaning the Assembly of the League";[22] also, that a unanimous resolution by the Assembly would give the Court the character of an institution of the League, essential for the appointment of judges and financing.

On the other hand, the Council maintained that a unanimous resolution by the Assembly was not alone sufficient to adopt the Draft Scheme as the special wording under Article 14 entitled the Council alone to the privilege of its submission to member states and that, if adopted by the Assembly, the scheme should also be subject to ratification. There were, therefore, three possibilities: (1) a resolution by the Assembly alone; (2) a convention submitted by the Council for ratification by member states; and (3) the embodiment of the Draft Statute in a recommendation, to be adopted by the Assembly and then submitted to ratification.

The desire of the Council to eliminate the Assembly and constitute itself the sole body to submit the Draft Scheme was complicated by a second development, namely, the substitution of the optional clause for compulsory jurisdiction. It will be recalled that one of the reasons given for eliminating compulsory jurisdiction was the belief that if that provision was passed unanimously by the Assembly it might constitute an amendment to the Covenant, and also give the Court precedence over the Council. In the discussions in the Third Committee, it was pointed out that the first fear might be removed by distinguishing be-

[21] *Records of the First Assembly,* Committees, Vol. 1; p. 300.
[22] *Ibid.;* p. 363.

tween political and legal questions and that for the latter the Court should have jurisdiction "because the decisions of the Court are the application of law and make law;[23] And a legal decision by the Council would never have the same weight. As to the second objection it was thought that an amendment might be adopted that "parties should be obliged to bring their case before the Court if they had not agreed to submit it to arbitration or inquiry by the Council."[24]

The Council, however, was not satisfied with these proposals and the dilemma presented was this: The Draft Scheme was in danger of defeat without some reference to compulsory jurisdiction; the Principal Allied Powers were opposed to its inclusion; therefore a unanimous vote by the Assembly was impossible. How, then, could the optional clause be included in the Draft Scheme in order to bind members who wished to maintain the principle of compulsory jurisdiction, and leave free members not wishing to be so bound? If the optional clause were included in the Draft Scheme how should it be ratified in order not to constitute an amendment to the Covenant, to which amendment the Council was opposed? Lastly, how could the Council avoid establishing a precedent if the Assembly were ignored as a deliberative body, which would be the case if the Draft Scheme was submitted by it directly to the states?

To escape this dilemma, it was proposed (1) that an optional clause should be included in the Draft Scheme; but voting for it should be by means of a separate Protocol of Signature and not merely by unanimous vote of the Assembly; (2) that the Council, as authorized by Article 14, should submit the Draft Scheme to member states in the form of a convention containing the draft and the optional clause for separate signature, provided it was stated in the Protocol of Signature that this procedure was adopted by reason of the special wording in Article 14 (so a precedent might not be created); and (3) that the Protocol of Signature should contain the words "approved by a unanimous vote of the Assembly."

These compromises having been agreed to, the following resolution was passed unanimously by the Assembly on December 13th, 1920:[25]

1. "The Assembly unanimously declares its approval of the draft statute of the Permanent Court of International Justice—as amended by the Assembly—which was prepared by the Council under Article 14 of the Covenant and submitted to the Assembly for its approval."

[23] *Records of First Assembly,* Committees, Vol. I; p. 285.
[24] *Ibid.;* p. 286.
[25] *Records of the First Assembly;* p. 500.

2. "In view of the special wording of Article 14, the Statute of the Court shall be submitted within the shortest possible time to the Members of the League of Nations for adoption in the form of a Protocol duly ratified and declaring their recognition of this Statute. It shall be the duty of the Council to submit the statute to the Members."

3. "As soon as this protocol has been ratified by the majority of the Members of the League, the Statute of the Court shall come into force, and the Court shall be called upon to sit in conformity with the said Statute in all disputes between the Members or States which have ratified as well as between the other States, to which the Court is open under Article 35, paragraph 2, of the said Statute."[26]

4. "The said Protocol shall likewise remain open for signature by the States mentioned in the Annex to the Covenant."

In accordance with this resolution, the Protocol of Signature was executed on December 16th, 1920, as follows:[27]

"The Members of the League of Nations, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of International Justice, which was approved by a unanimous vote of the Assembly of the League on the 13th December, 1920, at Geneva.

"Consequently, they hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

"The present Protocol, which has been drawn up in accordance with the decision taken by the Assembly of the League of Nations on the 13th December, 1920, is subject to ratification. Each Power shall send its ratification to the Secretary-General of the League of Nations; the latter shall take the necessary steps to notify such ratification to the other signatory Powers. The ratification shall be deposited in the archives of the Secretariat of the League of Nations.

"The said Protocol shall remain open for signature by the Members of the League of Nations and by the States mentioned in the Annex to the Covenant of the League.

"The Statute of the Court shall come into force as provided in the above-mentioned decision.

"Executed at Geneva, in a single copy, the French and English texts of which shall both be authentic.

"December 16, 1920."

[26] On January 1st, 1924, the following states had ratified this Statute: Albania, Australia, Austria, Belgium, Brazil, British Empire, Bulgaria, Canada, China, Cuba, Czechoslovakia, Denmark, Esthonia, Finland, France, Greece, Haiti, India, Italy, Japan, Latvia, Lithuania, Netherlands, New Zealand, Norway, Poland, Portugal, Roumania, Kingdom of the Serbs, Croats and Slovenes, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela.

[27] The use of the words Protocol of Signature seems to convey to many persons the impression that this was an unusual procedure with the League. On the contrary, amendments to the Covenant and also other instruments are sent to member states under a protocol of signature for ratification.

"OPTIONAL CLAUSE. The undersigned, being duly authorized thereto, further declare, on behalf of their Government, that, from this date, they accept as compulsory, *ipso facto* and without special Convention, the jurisdiction of the Court in conformity with Article 35, paragraph 2, of the Statute of the Court, under the following conditions." [28]

These Protocols of Signature were signed by a number of delegations, members of the Assembly, on December 17, 1920, gathering in a body for that purpose, so as to give the occasion due formality.

From the record of debate, it is therefore apparent that the third compromise, of embodying the Draft Scheme in a recommendation to be adopted by the Assembly and thence to be submitted to member states by the Council under a Protocol of Signature was adopted. This procedure was made necessary: (1) By the desire of the Council to eliminate the Assembly and the refusal of this body to submit to such elimination; (2) by the refusal of the Council to permit the unanimous vote of the Assembly to constitute final action, repudiating Mr. Wilson's interpretation that the members of the League under Article 14 were the Assembly; and (3) through the substitution of the optional clause for compulsory jurisdiction, thereby reviving the fear of an amendment to the Covenant and of the eclipse of the Council by the Court.

By providing a separate Protocol of Signature for the optional clause, states not wishing to accept any form of compulsory jurisdiction could sign the Protocol of Signature of the Draft Statute, containing that clause, without incurring any risk. By permitting the Assembly to adopt the Draft Scheme by unanimous vote, its dignity and prestige were saved; and by authorizing the Council to submit the Draft Scheme for ratification its point under Article 14 was sustained.

Therefore, the statement that the court statute "is a distinct instrument resting upon its own independent basis [the Assembly, according to Mr. Wilson] and deriving its operating force neither from the Covenant [Art. 14] nor from any action of the Assembly [Resolution of Dec. 13th] and Council of the League [Protocol of Dec. 16th] but from the "formalities of its own ratification and execution" [29] seems not to be warranted by the record of debate.

On the contrary the Protocol of Signature, providing for separate signatures for the Statute with or without the optional clause, was a device made necessary by the exigencies of the situation. Had the

[28] As specified by the signatory.

[29] "The United States and the New International Court," by Manley O. Hudson, member of the League Secretariat, *Foreign Affairs,* December, 1922; p. 71.

compulsory clause, as suggested by the jurists been adopted, the Court would have taken first rank in the settlement of disputes. This did not satisfy the Principal Allied Powers for the Court decides by a majority while the Council requires unanimity and some one of their votes is always the deciding voice. Had compulsory jurisdiction been abandoned entirely the small states would have defeated the adoption of the Draft Scheme and the Court would have been lost; and had the optional clause not been separated, the Allied Powers would have defeated the Draft Scheme. Therefore, this device solved the dilemma by retaining the Court as the subsidiary organ of the League; by granting to small states compulsory jurisdiction in principle; and by exempting the great powers from all liability under the optional clause.

THE PROTOCOL AND THE UNITED STATES

The Council, in protecting its own rights, had also in view increasing its own power. While the matter was under discussion, the national election of 1920 took place in the United States, the results indicating that American membership in the League of Nations would not be assumed. It became important to adopt some plan by which the United States Government might participate in the Court without seeming to become part of the League of Nations. In a memorandum submitted under date of December 3rd, 1920, Comm. Anzilotti, Secretary to the Committee of Jurists and Secretary to the Third Committee of the First Assembly stated:[30]

"It seems to be the simplest way of opening the Court to the accession of the United States to embody its constituent Statute in a convention to which the States could adhere."

The *rapporteur* of the Third Committee, M. Hagerup (Norway), in presenting the report to the Assembly, reiterated the belief:[31]

"This means that the United States of America can adhere to the Statute. You know that a representative of the United States of America, a man of the highest authority and the greatest competence, Mr. Elihu Root, took part in the preparation of the Hague scheme. The party to which he belongs will soon come into power, and, though they have not yet decided to enter the League of Nations they have proclaimed in a resolution that they are quite prepared to accept the Court. I think I shall be voicing the general sentiments of the Assembly when I say that this resolution may have important results. It is a first step which will perhaps lead to the entry of the United States of America into the League of Nations."

[30] *P. C. of I. J., Documents Concerning Action Taken by the Council;* p. 166.
[31] *Records of the First Assembly;* p. 441.

The possibility of the United States adhering to this instrument was one of the arguments used to secure approval of the Protocol from certain members of the Assembly who held the view that unanimous approval by that body was sufficient to adopt the Statute.

ACCESSIBILITY OF THE COURT

One of the perplexing questions before the Committee of Jurists related to the use of the Court. The Committee considered, first, whether private persons should be permitted to appear before it; and decided against this proposition on the ground that such a proceeding might tend to affect the sovereignty or independence of states. The instance was cited of an individual who might be claimed by two states as the subject of each; he then might bring an action against one or both states to determine the question of his nationality. The Committee of Jurists adopted the following text in the Draft Scheme which the Assembly Committee revised, as indicated:

Draft Scheme	*Present Statute*
Article 32. "The Court shall be open of right to the States mentioned in the Annex to the Covenant, and to such others as shall subsequently enter the League of Nations.	Article 35. "The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.
"Other States may have access to it.	"The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.
"The conditions under which the Court shall be open of right or accessible to States which are not Members of the League of Nations shall be determined by the Council, in accordance with Article 17 of the Covenant."	"When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute toward the expenses of the Court."

In accordance with the authorization, contained in Paragraph 2 of Article 35 of the present Statute, the Council has drafted the following regulations for the use of the Court by non-members of the League or those not mentioned in the Annex to the Covenant:[32]

1. "The Permanent Court of International Justice shall be open to a State which is not a member of the League of Nations or mentioned in the Annex to the Covenant of the League, upon the following conditions, namely: that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the

[32] *Official Journal*, June, 1922; p. 609.

Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and the Rules of Procedure of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

2. "Such declaration may be either particular or general.

"A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

"A general declaration is one accepting the jurisdiction generally in respect of all disputes, or of a particular class or classes of disputes which have already arisen or which may arise in the future.

"A State, in making such a general declaration, may accept the jurisdiction of the Court as compulsory, *ipso facto,* and without special convention, in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special conventions, be relied upon as regards members of the League of Nations or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the 'optional clause' provided for by the additional protocol of December 16th, 1920.

3. "The original declarations made under the terms of this resolution shall be kept in the custody of the Registrar of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all members of the League of Nations and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

4. "The Council of the League of Nations reserves the right to rescind or amend this resolution by a resolution which shall be communicated to the Court; and on the receipt of such communication by the Registrar of the Court, and to the extent determined by the new resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

5. "All questions as to the validity or the effect of a declaration made under the terms of this resolution shall be decided by the Court."

The essential differences between the Draft Scheme and the Present Statute are that in the former the conditions under which the Court was to have been used by non-member states were to have been determined by the Council in accordance with Article 17, which authorizes the Council to modify Articles 12-16, inclusive, of the Covenant in dealing with disputes; whereas the present Statute makes such use subject to special provisions contained in treaties, dependent upon the conditions laid down by the Council; but in no case are these conditions to create a position of inequality before the Court.

This last provision raises an interesting question. The regulations adopted by the Council provide that any state accepting the jurisdiction of the Court undertakes to carry out in full good faith the decision and *not to resort to war against a state complying therewith.*

This is in effect an application of the principle of Paragraph 6 of Article 15 of the Covenant. The question which arises is whether this provision in the event of its being applied to non-member states would create an inequality for such states. There is no provision in Article 15 of the Covenant which includes *judicial decisions,* the amendment to that effect thus far having failed of ratification.[33] In the event that member states submit a dispute to the Court for a judgment, would they be bound by Article 15 not to go to war with a party that accepted the judgment? If so, the Court is dependent upon the Covenant for its sanction; if not, do not the regulations of the Council for non-member states impose a condition not suffered by member states? Also, in the event that the Council may decide what coercive measures may be applied to a non-execution of the judgment of the Court, such states would be responsible not to the Court but to the Council.[34] Any state having under consideration adherence to the Court Statute without entering the League will find this question not without significance. Thus far, the regulations prepared by the Council have not been applied, for no non-member state has sought to use the Court under the conditions mentioned. Germany is the only non-member state which has appeared before the Court and that was under special Treaty provisions which did not require the League's consent. Nor have member states been successful in bringing non-member states before the Court, Russia having declined in the Eastern Carelian dispute.

ARBITRAL FEATURES OF THE COURT STATUTE

The Third Committee of the First Assembly proposed amendments to the Draft Scheme which indicated still further its intention to create an arbitral tribunal. Article 35 of the Draft Scheme (Article 38 of the present Statute) provided that the Court should apply international conventions, customs and principles of law. The existing provisions were retained, but they were limited by two new provisions. To the Article was added the following clause:

> "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto."

With reference to this addition to the Draft Scheme, Dr. James Brown Scott has observed:[35]

[33] Chap. I; p. 13.

[34] See p. 486 for discussion that a non-execution of the judgment of the Court would constitute a violation of the Covenant.

[35] *Am. J. Int. Law,* April, 1921; p. 265.

"The provision just quoted is believed to be a mistake. A court of justice should be a court of law. It should not be authorized to sit as a court of arbitration, deciding questions presented to it upon the principle of give and take, or upon its own sense of the fitness of things. This is the function of the so-called Permanent Court of Arbitration. The opening article of the project provides that the Court of Arbitration, on the one hand, and the Permanent Court of International Justice, on the other, are to be distinct bodies. This paragraph breaks down the separation and makes the Court of Justice to a certain extent a competing body."

A second addition made to the Draft Scheme by the Council is a new article, (59) of the present Statute. It provides:

"The decision of the Court has no binding force except between the parties and in respect of that particular case."

This Article further confuses the judicial and arbitral functions of the Court. Upon this provision, Dr. Scott comments as follows:[36]

"It was apparently in keeping with arbitral procedure, in which awards bind only the parties and are limited to the case. It was the natural consequence of making a resort to the court depend upon a special agreement of the parties defining the issue to be submitted to the court. It is out of place, it is believed, in a court with a jurisdiction, however limited, and it is a final indication on the part of the Great Powers that, after all, only the things possible in 1907 stood a chance of being accepted in 1920. The large Powers had the choice between judicial procedure in the project drafted by the Advisory Committee, and arbitral procedure in the draft convention of 1907 for the Court of Arbitral Justice. They preferred the latter."

A third provision, identifying the Court with arbitration, was proposed by the Advisory Committee of Jurists in Article 31, which authorizes judges of the nationality of the contesting parties to retain their right to sit on the bench and authorizes a party, not having one of its nationals on the bench, to select from the deputy judges, if there be one, a judge of its nationality, and, if not, to select a judge, preferably from among the persons nominated as candidates for the bench. This article was retained by the Assembly.

ELECTION OF JUDGES BY THE LEAGUE

In the matter of the election of judges, the Council and Assembly found no reason to make any change in the Draft Scheme, as the proposal recognized the full authority of the League.

Mr. Root proposed to the Committee of Jurists that the judges be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration and

[36] *Am. J. Int. Law,* April, 1921; p. 266.

that the number should be increased by the Assembly on the proposal of the Council. The Assembly and Council were then to proceed independently of one another to elect the judges and then the deputy judges; and to fill vacancies in the same manner.[37]

In making this proposal, Mr. Root said there were two underlying ideas: (1) That the new Court should be a part of the judicial system in which the old Court of Arbitration, still in existence, would also be included; and (2) that the new Court should form part of the system of the League of Nations. In this manner were both Courts to be part of the League System.

In advocating that members of the Permanent Court of Arbitration act as electors, Mr. Root gave as his reasons that they would not be suspected of making a political choice; they were more likely to have an international mind; and they were in a position to take into consideration questions with which the Court would deal: also, the relative merits of persons to be selected in the several countries. He urged that co-operation with the Permanent Court of Arbitration should be at the beginning instead of at the end of the procedure; otherwise the part played by the Council and Assembly would be too much reduced.

The plan, as proposed by Mr. Root, included the following points:[38]

"1. Election by Assembly and Council.

"2. Qualification: juridical eminence, and character.

"3. Lists of persons deemed to have qualification to be furnished before a meeting of the Assembly by the members of the Permanent Court of Arbitration at The Hague—the members appointed by each nation to propose not less than two nor more than four names, one-half to be from nations other than that by which the proposers are appointed.

"4. Votes on the list thus formed as provided by Lord Phillimore.

"5. So far as vacancies may not be filled by election from this list, other names may be proposed by Assembly or Council and voted upon in like manner.

"6. In all elections, the electors to be under honorable obligation in regard to the qualifications stated and to seek adequate representation in the Court for the different systems of jurisprudence."

[37] On September 14th-16th, 1921, the following were elected as judges and deputy judges:

M. Altamira (Spain), M. Anzilotti (Italy), M. Barbosa (Brazil), M. de Bustamente (Cuba), Viscount Finlay (Great Britain), M. Loder (Netherlands), Mr. Moore (U. S.), M. Oda (Japan), M. Weiss (France), M. Huber (Switzerland), M. Nyholm (Denmark), judges. M. Negulesco (Roumania), M. Wang (China), M. Yoanovitch (Serb-Croat-Slovene State), and M. Beichman (Norway), deputy judges. The Court was formally opened on February 15th, 1922, at The Hague. One vacancy has occurred (M. Barbosa) and was filled by electing M. Pessoa (Brazil) on September 10th, 1923.

[38] *P. C. of I. J., Advisory Committee of Jurists;* p. 166.

Mr. Root stated that this proposal was based upon two fundamental propositions:[39] That the Permanent Court of Arbitration should remain and not be superseded; and that the two courts should be part of the same juridical system.

In practice, the Court of Arbitration appears to have been superseded. In the controversy over the Nationalities Decrees, between Great Britain and France, the Treaty of 1903, upon which the submission for arbitration was based, specified the *Permanent Court of Arbitration,* established at The Hague in 1899, as the tribunal; it was superseded by resort to the Permanent Court.[40] Aside from its service in preparing a panel for the use of the League, The Hague Organization has thus far not enjoyed a conspicuous place in the international juridical system.

In view of the stated intentions of the Peace Conference, of the instructions of the Council to the Commission of Jurists, of Mr. Root's statement in accepting his duties and his stated conviction that his plan for the election of judges conformed to the accepted belief that the Court was to form part of the League System and was designed to that end, it is difficult, in the absence of equally definite facts to the contrary, to find any justification for the allegation that the Council and Assembly in performing the duties of election are electoral bodies sitting apart in an electoral college which forms no part of the League System and is not dependent upon the Covenant.

It has also been pointed out by Senator Pepper in the Report accompanying the Senate Resolution, introduced on May 22nd, 1924, that "states represented in the League may vote for judges of the Court in virtue of League membership, without adhering to the Court or becoming directly responsible for its maintenance."[41] Under such circumstances the Assembly acts not as an electoral body of signatories to the Protocol of the Court Statute, but as an assembly of member states, meeting in regular session to transact the business of the League.[42]

[39] Mr. Root lays less claim to credit for this proposal than do his countrymen, for in submitting the plan he said:

"I claim no patent or copyright upon these various proposals and admit that they are stolen property."—*(Am. J. Int. Law,* January, 1921; p. 12.) See also p. 438.

[40] Chap. XXVIII; p. 542.

[41] U. S. Senate, 68th Congress, First Session, Report No. 634.

[42] The idea that the Assembly and Council sit as an electoral college representing member States seems not to have been sustained when a vacancy was filled by the election of Judge Pessoa on September 10th, 1923. On that occasion, the agenda for the session consisted of the following items, indicating that it was a regular consecutive session of that body of which the election of judges was but one item: (17) Appointment of substitute delegates for Cuba

POSITION OF JUDGES

The Advisory Committee of Jurists and members of the League were not in entire agreement as to the position of judges. Article 29 of the Draft Scheme provided that an annual indemnity should be paid to judges, to be determined by the Assembly upon proposals from the Council. This provision was accepted without change. But paragraph 7 of Article 29 as presented by the jurists was changed as follows:

Draft Scheme	*Present Statute*
Article 29. "A special regulation shall provide for the pensions to which the judges and registrar shall be entitled."	Article 32. "The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which the retiring pensions may be given to the personnel of the Court."

The entire financing of the Court, including salaries, expenses and pensions, is thus brought under the League, depending upon proposals made by the Council and approved by the Assembly.[43]

The question whether judges of the Court should exercise any political functions was decided in the negative by the Committee of Jurists and was held to apply to both judges and deputy judges. The Assembly, however, made a distinction as follows:

Draft Scheme	*Present Statute*
Article 16. "The exercise of any function which belongs to the political direction, national or international, of States, by the Members of the Court, during their terms of office is declared incompatible with their judicial duties. "Any doubt upon this point is settled by the decision of the Court."	Article 16. "The ordinary Members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court. "Any doubt on this point is settled by the decision of the Court."
Article 17. "No Member of the Court can act as agent, counsel or advocate in any case of an international nature. No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate, for one	Article 17. "No Member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy judges as regards cases in which they are called upon to exercise their functions on the Court.

and Czechoslovakia; (18) Budget; (19) Protection of women and children in the Near East; (20) Election of a judge to the Permanent Court; (21) Admission of the Irish Free State; (22) Earthquake Disaster in Japan.—(*Verbatim Record of the Fourth Assembly,* September 10th, 1923.)

[43] "The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council." (Art. 33.)

of the contesting parties, or as a Member of a national or international Court, or of a Commission of Inquiry, or in any other capacity.

"Any doubt upon this point is settled by the decision of the Court."

"No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel, or advocate for one of the contesting parties, or as a member of a national or international Court, or of a Commission of Inquiry, or in any other capacity.

"Any doubt on this point is settled by the decision of the Court."

The Committee of Jurists in the Draft Scheme removed the possibility of political activity and influence from the entire bench, while the Assembly thought it necessary to safeguard only the ordinary members. Commenting upon this modification, Dr. Scott observes:[44]

"This can only mean that the ordinary judges are looked upon as judicial officers during the entire period of their appointment, whereas the deputy judges are only to be considered as such during actual service upon the bench. This distinction was followed by the Assembly in fixing the salaries and allowances of the members of the court in conformity with Article 32 of the Statute. Ordinary judges receive an annual salary in addition to duty allowances, whereas deputy judges are paid only for the time they are actually in the service of the Court. If a military expression be permitted, the ordinary judges are always in active service, the deputy judges are in the reserve, subject to call."

LABOR AND TRANSIT PROVISIONS

The Committee of Jurists had before it a proposal to consider the creation of special chambers and the selection of special judges to deal with Part XIII of the Treaty of Versailles relating to Labor, and Part XII relating to Transit.

The first proposal was presented to the Advisory Committee through a communication from the Director of the International Labor Office to the Secretary-General of the League. In this communication, he pointed out that under Part XIII of the Treaty, the Court was given jurisdiction in certain labor disputes, particularly under Article 415, which provides when recommendations are made to one or more governments in a dispute concerning labor questions, and they are not accepted, the matter may be submitted to the Permanent Court; and under Articles 418 and 419, which authorize the Court to indicate the economic penalties when states do not comply with its decisions in such labor cases.

The Director contended that these Articles required that the rôle of

[44] *Am. J. Int. Law*, April, 1921; p. 262.

the International Labor Office must be defined, inasmuch as it might act as prosecutor, and:[45]

"In order that the Permanent Court may base its decisions upon an exact knowledge of the facts in labour questions, and in order that a just decision may be guaranteed, it is necessary either that employers and workmen should form part of the Court of Justice, or that expert advisers, or groups of experts, should be provided."

Although the Committee of Jurists was not sufficiently impressed with this request to make a recommendation, Great Britain proposed that a new article should be added, creating a special chamber for the purpose of dealing with labor disputes, and consisting of five judges. Also, that technical assessors should be selected in each case from a list of persons nominated by each member of the League. When the proposal was under discussion, the Director of the International Labor Office appeared before the Third Committee and urged that amendments be adopted, giving more power to the assessors and greater recognition to the International Labor Office.[46] There was marked opposition to creating a tribunal with special jurisdiction. Some members were of the opinion that it showed a distrust of the Permanent Court to attach assessors to control its activity in certain respects, and that it would create an undesirable precedent which might result in setting up special sections for all kinds of cases. The method of selecting assessors was also attacked. It was pointed out that the number of assessors would be about 164 and the choice of four of them by the Court in any given case would, by mere chance, result in the selection of the four best suited to give expert advice. There was decided objection to admitting an international organization before the Court.

The British proposal prevailed and the Assembly added a new Article (26) to the Draft Scheme, providing for a special chamber of five judges. In accordance with the request of the Director of the International Labor Office, it included in the Article the following two paragraphs.[47]

"The technical assessors shall be chosen for each particular case, in accordance with rules of procedure under Article 30, from a list of 'Assessors of Labor cases,' composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labor Office. The Governing Body will nominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

[45] *Records of the First Assembly,* Committees, Vol. I; p. 555.
[46] See page 442.
[47] *Records of the First Assembly,* Committees, Vol. I; p. 575.

"In Labor cases the International Labor Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings."

It will be observed that in adopting a scheme of special jurisdiction, which the Committee of Jurists had ignored, the Draft Scheme placed Part XIII of the Treaty of Versailles, relating to labor, in a favored position and created a precedent for special jurisdiction.[48] Further, the experts chosen to assist the judges are to be selected by the League of Nations; for only member states and the Governing Body of the International Labor Office may nominate persons for this list. A non-member state, therefore, would not have the right to participate in their selection. Finally, it will be observed that the International Labor Office is authorized to "furnish the Court with all relevant information."

No questions have been submitted under Part XIII of the Treaty, as no complaints have been made regarding the non-observance of conventions which have been referred to a Commission of Inquiry.

PUBLICITY

The Committee of Jurists established the principle that the hearings of the Court should be public, but the League amended the provision, as follows:

Draft Scheme	*Present Statute*
Article 45. "The hearing in Court shall be public, unless the Court, at the written request of one of the parties, accompanied by a statement of his reasons, shall otherwise decide."	Article 46. "The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted."

In the Third Committee, this transformation of Article 45 provoked considerable discussion. France was in favor of the principle of secret sessions, as insuring the conduct of cases in a way not to embitter relations between states; and also asserted that it was more prudent to leave the matter of public sessions to the discretion of the judges. Other members, however, believed this to be too wide a departure from the principle followed in judicial procedure and that it was better to recognize the principle of publicity and put the responsibility upon the Court rather than upon the parties. The compromise places the responsibility upon the Court, abolishes the necessity for parties to

[48] Upon representation of the British Government, the Third Committee recommended that a special chamber be constituted to deal with cases arising under Part XII of the Treaty of Versailles relating to ports, waterways and railways and the corresponding portions of other treaties. Assessors were to be selected in the same manner as those for labor cases. This recommendation was adopted and constitutes Article 27 of the present Statute. Annex II.

give reasons and requires a demand from both parties if secrecy is to be resorted to at their instance.

DISSENTING OPINIONS

In the matter of dissenting opinions the League appears to have improved upon the proposal made in the Draft Scheme as the following comparative texts indicate:

Draft Scheme

Article 56. "If the judgment given does not represent, wholly or in part, the unanimous opinion of the judges, the dissenting judges shall be entitled to have the fact of their dissent or reservations mentioned in it. But the reasons for their dissent or reservations shall not be expressed in the judgment."

Present Statute

Article 57. "If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion."

The Committee of Jurists gave as its reason for not permitting dissenting judges to deliver a separate opinion that a judge of the same nationality as one of the parties would write "long statements in favor of that state after it had lost its case;" and it followed that as national judges were not to have this right, it was not thought desirable that other judges should possess it. But the deciding factor appears to have been the practical reason that:[49]

"It might happen that, as a result of the declaration of dissent recorded by the judges, it would be easy to find out on which side a national judge voted, by a simple calculation of the majority: there is therefore no reason why he should not be allowed, if he so desires, to say frankly on which side he has voted. If he can do so in this case, why should he be forbidden to do so in others? Judges of the nationality of a contesting party cannot be put in a position unequal to that of the other judges."

The Third Committee, however, thought that dissenting opinions would augment rather than diminish the authority of the Court, and suggested the amendment. In the one judgment rendered in the matter of the S. S. Wimbledon there were two dissenting opinions; one by MM. Anzilotti (Italy) and Huber (Switzerland), and the other by M. Schücking, the national judge for Germany.[50] In the advisory opinions rendered, in one instance, that of the competence of the International Labor Office with regard to agricultural labor, M. Weiss (France) and M. Negulesco (deputy judge, Roumania), availed themselves of the right, under Rule 71 of the Court Rules, to declare that

[49] *P. C. of I. J., Proceedings of the Advisory Committee of Jurists;* p. 742.
[50] Chap. XXXII; p. 609.

they were unable to concur in the opinion given by the Court; but they did not submit an opinion.[51]

SANCTIONS

This reference is to an omission from rather than to an alteration in the Draft Scheme. Ordinarily an instrument creating a judicial or arbitral body provides for some form of sanction, at least that the parties agree in good faith to accept and abide by the award. The Hague Convention of 1907 and the Covenant contain such provisions. The omission of all references to sanction in the Court Statute is not an oversight, for it was discussed in the Advisory Committee, in the Council, in the Third Committee and in the Assembly. M. Bourgeois laid down the guiding principle in his address at the opening session of the Committee of Jurists when he stated:[52]

"Finally, there is a last point of view, which we must take in order to envisage the necessary relations between the League of Nations and the International Court of Justice, and the close solidarity which exists and which will always exist to an increasing degree between their two actions.

"I approach here briefly the decisive problem of sanction.

"What would be the efficacy, what would be the reality of a sentence of justice, if it did not find in a strong organization of international institutions what one calls in a technical term the executory of these decisions?

"The Covenant foresees several degrees of sanction, juridical sanction, diplomatic sanction, economic sanction, and as a last resort and, within limits very closely confined, military sanction."

In concluding his address, M. Bourgeois said:

"Speaking in the name of the Council of the League of Nations . . . we are ready to assure as completely as possible the extent of its [Court] competence and the execution of its judgments." * *

In accordance with this assurance, the Committee of Jurists decided to leave this matter to the League. When the matter was discussed in the Third Committee, the chairman pointed out that the sanction provided in Article 13 must *a fortiori* apply to the awards of the Court and that in any case Article 16 would be applied, since a non-execution of the judgment of the Court would constitute a violation of the Covenant.[53] The Committee, therefore, did not report favorably upon the amendment proposed by Argentina specifying the nature of the penalties.[54]

[51] Chap. XXVII; p. 532.

[52] *P. C. of I. J., Advisory Committee of Jurists;* p. 10.

[53] *Records of the First Assembly,* Committees, Vol. I; p. 377.

[54] For details of the Argentine proposal, see *Records of the First Assembly;* p. 520.

When the Draft Statute was before the Assembly, this omission was noted by the representative of Panama, who pointed out that no provision had been made for sanction. He thereupon offered the following amendment:[55]

"In the event of any failure to carry out the decrees, the Court shall propose what steps should be taken to give effect thereto."

This amendment was not adopted, the *rapporteur* for the Third Committee stating that the Committee thought it best to keep within the provisions laid down by the Covenant; and that the Committee considered that "it followed as a matter of course that coercive measures in connection with judgments of the Court would be the same as those contemplated in regard to the general obligations which arise under the Covenant." He stated also that "it would be more in conformity with the spirit and letter of the Covenant to entrust the Council rather than the Court with the duty of deciding what coercive measures should be employed"; and that the Committee even considers that such a clause would run somewhat counter to the provisions of the Covenant.[56]

The opinions of the Committee of Jurists, of the Council, and of the Assembly were clearly to the effect that the sanction of the Court should be and is vested in the League. Since no provision is made in the Statute, this sanction is the only one which can be applied to non-member states using the Court. In the event that it is not acceptable to such states, there is no other, not even that of good faith being specified.

The sanction contained in the Covenant which may be applicable to a judgment or advisory opinion by the Court stipulates an agreement not to resort to war within three months after an award (Art. 12) and the obligation to carry out in full good faith any award and not to resort to war against a member state accepting the award (Arts. 13, 15).[57] In the event that a member state disregards an opinion or decision of the Court, this act would in effect be a violation of the Covenant, and if the state resorted to war, the economic and military sanctions under Article 16 would be applicable; also the provision with regard to expulsion.

The practical question had been definitely raised in one issue, that of the German settlers in Poland, wherein the Court rendered an

[55] *Records of the First Assembly;* p. 456.

[56] *Ibid.;* p. 491.

[57] The proposed amendments to these articles to include "judicial decision" furthers the purpose of the League to include the sanction for Court decisions within the Covenant.

opinion unfavorable to Poland under the Minority Treaty.[58] The Polish Government, in defiance of the Court opinion, continued the evictions, refused to reinstate the settlers illegally evicted, and is now arranging with the Council concerning the terms of compensation, the Council having accepted the ultimatum from Poland that the Polish Government would not reinstate the settlers.

AMENDMENTS

Upon the question of amendments, there appears to have been complete silence. The Advisory Committee made no recommendation; the Council made no suggestions; and the Third Committee and Assembly did not discuss the subject. Neither the resolution of December 13th, nor the Protocol of December 16th, 1920, contain any references to amendments. M. Bourgeois, the guide of the Draft Scheme, however, in addressing the Assembly on the occasion of the presentation of the Report of the Third Committee said:[59]

"This Court will be absolutely independent. Its relations with the League of Nations can be easily defined. It will be for the League to establish the Court and to draft its Statute. But from that moment, and so long as the League of Nations has not by its sovereign power altered those rules, the Court is independent."

It is, therefore, apparent that the sovereign power to alter the rules governing the Court is understood to be the League of Nations. That this was also the understanding of the Council appears from its adoption of the report of M. Bourgeois at its meeting on October 27th, 1920, containing the following statement:[60]

"The powers of the Council and the Assembly are such that they extend to the transformation of the composition of the Court itself, but when they have fully exercised their rights by establishing international jurisdiction under conditions determined by them it is important for them to allow the latter independence in its judgment."

Presumably, therefore, in the absence of other rules to the contrary, the procedure used for the adoption of the Draft Scheme will be followed in its amendment, namely: (1) Submission of proposed amendments to the Council; (2) recommendations by the Council to the Assembly; (3) reference by the Assembly to a sub-committee; (4) adoption by the Assembly; and (5) submission by the Council to member states under a Protocol of Signature. It is, therefore, conclusive that any state desiring to amend the Court Statute must proceed through the medium of the Council and the Assembly.

[58] Chap. XXX; p. 581.
[59] *Records of the First Assembly;* p. 437.
[60] *Records of the First Assembly Committees,* Vol. 1; p. 476.

RECAPITULATION

The vital modifications made by the League in the Draft Scheme submitted by the Committee of Jurists include the following:[61]

Committee of Jurists	*League of Nations*
The Court shall have jurisdiction to hear and determine suits between states. (Art. 31.)	The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.
Compulsory jurisdiction in a limited number of cases. (Art. 33.)	Optional compulsory jurisdiction in similar cases. (Art. 36.)
Court open to all states members of League mentioned in the Annex; other states to have access determined under rules by Council according to Art. 17 of the Covenant. (Art. 32.)	Only members of League or states can be parties. Conditions under which Court is accessible to non-members to be determined by Council according to the Covenant and subject to Treaty provisions. (Art. 35.)
Advisory opinions to be given by the Court, judgments and opinions differentiated. (Art. 36.)	All specific reference to advisory opinions omitted from the Court Statute.
States to have nationals on the bench, when interests involved in an actual dispute submitted for advisory opinion.	Abolished by Assembly not included in Court Rules and practice.
The application of international conventions, customs, general principles of law and judicial decisions and teachings by the Court. (Art. 35.)	Addition of the qualifying provision that such rules should not prejudice the power of the Court to decide a question *ex aequo et bono* if the parties so request. (Art. 38.)
The judgment is final and without appeal. (Art. 58.)	The addition of a new article that the decision of the Court has no binding force, except between the parties and in respect to that particular case. (Art. 59.)
No special jurisdiction given to classes of cases.	Special privileges to labor and transit cases under the Versailles Treaty; (new Arts. 26-27). Special privilege to International Labor Office to furnish information and nominate technical advisors.
Judges and deputy judges prohibited from exercising political functions.	Deputy judges exempted when not performing judicial duties.

[61] The provisions in Column 1 were in the draft which embodied Mr. Root's views; they were not submitted to the General Assembly or States for ratification. Column 2 contains the alternate provisions which were submitted to the Assembly and to the member States.

COMMENTARY

The foregoing analysis indicates the following significant differentiations between the Draft Scheme and the Present Statute with their relevancy to peace and security: (1) The Draft Scheme carried forward the ideals and achievements of The Hague Conference; the Court which the League created does not. (2) The Draft Scheme created a tribunal of justice before which any state could have brought its grievance within the specifications laid down; the Court which the League created destroyed that principle of equal justice. (3) The Draft Scheme created a world court; the Court which the League created is a limited Court. (4) The Draft Scheme raised judicial decisions above advisory opinions; the court which the League created has been compelled by the abolition of Article 36 and the practice of the Council to raise advisory opinions above judicial decisions. (5) The Draft Scheme laid the foundation for the creation of international law; the Court which the League created leaves this in theory to the Assembly. (6) The Draft Scheme protected judges and deputy judges from political corruption; the League plan limits the protection to judges and extends it to deputy judges only when engaged on cases. (7) The Draft Scheme might have prevented wars; the League Court has had no appreciable effect upon the preservation of peace.

CHAPTER XXVI

THE TWO HAGUE COURTS

There are in existence two international courts—the Permanent Court of Arbitration and the Permanent Court of International Justice. Both are located at The Hague. The Court of Arbitration was created at the Hague Conference of 1899, under a Convention for the Pacific Settlement of Disputes and perfected by the Hague Conference of 1907. That Conference also prepared a draft scheme for a Court of Arbitral Justice which was not adopted by the High Contracting Powers represented at the Conference. The machinery for the settlement of disputes, created in 1899 and 1907, consists of three procedures: mediation, wherein a third party can offer its service as a friendly act to parties in a dispute; inquiry, wherein disputes affecting neither honor nor vital interests, but differences of opinion on points of fact, may be submitted to commissions of inquiry according to rules regulating such commissions; and arbitration, for which purpose there has been created a Permanent Court of Arbitration under the direction of an International Bureau. This Bureau is supervised by a Permanent Advisory Council, consisting of the diplomatic representatives of the contracting Powers stationed at The Hague.[1]

The Permanent Court of International Justice was authorized by the Peace Conference at Paris in 1919, and was created by the League of Nations in 1920. Its political supervisor is the Council of the League, a body which provides for this Court the organization corresponding to that of the Advisory Council for the Court of Arbitration.[2]

Public opinion is somewhat confused concerning the origin and function of these two institutions; their relationship to each other and their relative values in the prevention of war. Such is the confusion that at one and the same time the two courts are described as supplemental, parallel, identical and competitive with each other. The question of whether both are arbitral but adds to the confusion.

Obviously not all of these conflicting suppositions can be true; and

[1] For the purpose of this comparison, only the arbitration section of this Convention is analyzed. The reader interested in comparing the mediation sections with the Covenant and the inquiry sections with the procedure of the Council in settling disputes will find additional points of interest in the *Proceedings of the Hague Peace Conferences,* published by the Carnegie Endowment for International Peace.

[2] Chap. II; p. 38, for personnel of the Council.

since some states adhere to one court and others do not; and both constitute machinery for the substitution of law for force, neither should be abandoned under a misapprehension. The following analysis undertakes to present the points of similarity and of differentiation and to point out wherein each possesses advantages or disadvantages for the prevention of war. The statutes and record of each court furnish the basis for such comparison.

THE ORIGIN OF THE TWO COURTS

The origin and background of the two courts are widely different. The Court of Arbitration had its origin in an atmosphere of peace, for which there was considerable juridical preparation. The Institute of International Law, founded in 1873 on the initiative of an American, Francis Lieber, was the forerunner of the first international undertaking to resort to arbitration instead of to war. A second step was the formation of the Inter-Parliamentary Union, which held its first meeting in Paris in 1888; at the meeting of this body at The Hague in 1894, the following resolution was drafted:[3]

"1. National sovereignty remains inalienable and inviolate;
"2. Adherence by any government to the creation of a permanent international court must be entirely voluntary;
"3. All adhering States must be on a footing of perfect equality before the permanent international court;
"4. The decision of the permanent court must have the force of decisions, subject to execution."

In 1895, at the Brussels meeting of the Union, this resolution was made the basis of a project for an international tribunal. On August 12th, 1898, Count Mourawieff, Russian Minister of Foreign Affairs, by order of Czar Nicholas II, sent a note to the ministers, accredited to the Court of St. Petersburg, in which he proposed that a conference be held to consider the limitation of armaments and a reduction of the economic burdens which their continuance imposed. The note stated that "the Imperial Government thinks that the present moment would be very favorable for an inquiry, by means of international discussion, as the most effectual means of securing to all peoples the benefits of a real and durable peace, and before all, of putting an end to the progressive development of the present armaments."[4]

On December 30th, 1898, these representatives received a second and more definite proposal which outlined the purpose as follows:[5]

[3] James Brown Scott: *The Hague Court Reports;* p. xii.
[4] W. E. Darbey, *International Tribunals;* p. 410.
[5] Scott, *The Hague Court Reports;* p. xiii.

"Acceptance, in principle, of the use of good offices, mediation, and voluntary arbitration, in cases where they are available, with the purpose of preventing armed conflicts between nations; understanding in relation to their mode of application and establishment of a uniform practice in employing them."

As a result of this invitation, in November, 1899, there assembled the First Hague Peace Conference. Using the project of the Inter-Parliamentary Union as a basis, the Conference created the Permanent Court of Arbitration, in reality machinery for establishing arbitral tribunals. It also drafted a code of arbitral procedure. It is generally believed that this proposal was an American idea, due to American initiative, but it seems to have resulted from the joint effort of the American delegation whose instructions were based upon a history of the peace movement in the United States and embodied a plan for an international court, and of Lord Pauncefote, who was instructed by Great Britain to propose a court of arbitration. The Convention for the Pacific Settlement of International Disputes was the outcome.

Under this Convention the following disputes were settled: The Pious Fund Case, between the United States and Mexico (October 14th, 1902); The Venezuelan Preferential Case, between Great Britain, Germany, Italy and Venezuela (February 22nd, 1904); The Japanese House Tax Case, between France, Great Britain and Japan (May 22nd, 1905); and The Muscat Dhows Case, between Great Britain and France (August 8th, 1905).[6]

Because of the growth of public opinion in favor of international arbitration, a Second Hague Peace Conference was called by the Czar in 1907. The American delegation was instructed by Secretary Root to advocate a permanent court to be formed of judges acting under a juridical responsibility. Among the achievements of the Second Hague Conference were the re-enactment and improvement of the Convention for the Pacific Settlement of Disputes, progress in the codification of law, a Declaration Concerning Obligatory Jurisdiction, and the formulation of a plan for a Court of Arbitral Justice.[7] This plan failed of

[6] *Ibid.*

[7] The Hague Conference of 1907 was ratified by the following signatory powers: Austria-Hungary, Belgium, Bolivia, Brazil, China, Cuba, Denmark, France, Germany, Guatemala, Haiti, Japan, Luxemburg, Mexico, Netherlands, Norway, Panama, Portugal, Roumania, Russia, Salvador, Siam, Spain, Sweden, Switzerland, United States. Nicaragua adhered to the Convention, and the following states signed but did not ratify: Argentine Republic, Bulgaria, Chile, Colombia, Dominican Republic, Ecuador, Great Britain, Greece, Italy, Montenegro, Paraguay, Persia, Peru, Serbia, Turkey, Uruguay, Venezuela. The following states signed with reservations: Brazil, Chile, Greece, Japan, Roumania, Switzerland, Turkey and the United States. (Scott, *The Hague Court Reports;* p. CIV.)

official adoption, owing to lack of agreement upon a method of electing judges which defect a Third Hague Conference was to undertake to remedy, but which Conference did not take place, owing to the war.

It will be observed that the foundations of the Hague Conferences and of the Court of Arbitration were: (1) The desire during peace times to secure the continuance of peace; (2) the belief that the codification and formulation of international law were essential to the construction of a court; (3) the equality of all states represented, with none excluded from participation; and (4) prevalence of a scientific spirit and juridical atmosphere in a deliberative body.

Under the Convention of 1907, the following disputes have been settled: The Casablanca Case, between France and Germany (May 22nd, 1909); the Grisbadarna Case, between Norway and Sweden (October 23rd, 1909); the North Atlantic Coast Fisheries Case, between Great Britain and the United States (September 7th, 1910); the Orinoco Steamship Company Case, between the United States and Venezuela (October 25th, 1910); the Savarkar Case, between France and Great Britain (February 24th, 1911); the Canevaro Case, between Italy and Peru (May 3rd, 1912); the Russian Indemnity Case, between Russia and Turkey (November 11th, 1912); the Carthage Case, between France and Italy (May 6th, 1913); the Manouba Case, between France and Italy (May 6th, 1913); and the Island of Timor Case, between the Netherlands and Portugal (June 25th, 1914). Since the war, the Court of Arbitration has rendered awards in two cases submitted before the war, namely, Contested Property in Portugal, between France, Great Britain, Spain and Portugal (September 2nd, 1920); and the French Claims against Peru (October 11th, 1921). In two instances, inquiries have been conducted by commissions, namely, the Dogger Bank Case, where France used its good offices to restore peace between Russia and Great Britain; and the Tavignano, Camouna and Gaulois Case, involving a controversy between France and Italy.[8]

It will be observed that among the Great Powers France appears in nine arbitration cases or inquiries; Great Britain in seven; Italy in five; and the United States in four arbitrations.

The part taken by the United States in these Peace Conferences appears to have constituted but one aspect of its general policy toward peace. This country has been a pioneer in advocating peace as the nor-

[8] The Norwegian Ship Case, in which Norway and the United States were parties, appears to have been settled by an arbitral tribunal acting independently of the Hague Convention.

mal condition of mankind and law as the method of settling disputes. Presidents Grant, Arthur, Harrison, Cleveland, McKinley, Roosevelt and Taft approved of a system of arbitration in their messages to Congress. In 1881, Secretary Blaine addressed an instruction to the United States Ministers in Central and South America, suggesting that representatives of these countries participate in a congress to be held in Washington in 1882 for the purpose of preventing war between the nations of America. From this policy have developed the Pan-American Conferences, and the Pan-American Treaty of 1924.[9] And from these experiences is now developing the movement in the United States to outlaw war. Therefore, the interest of the United States in the prevention of war has not centered in any one movement, nor is it circumscribed by any particular form of machinery. Its effort has been bent steadily toward the abolition of war; and every form of machinery is but incidental to that idea, transitory if need be and permanent only when it serves the ultimate objective of the United States.

The origin of the Court of Justice was, however, very different from that of the Court of Arbitration. The proposal originated in an atmosphere of war and was the recommendation of four Powers—all victors in war. Three of these Powers were engaged in dividing territory, in fixing punitive measures, and in constructing military barriers to secure their new acquisitions. Their main task was to divide the territory of enemy powers, isolate ports, internationalize rivers, bisect sea, rail and water connections and otherwise rearrange the existing economic order. The idea of a Court was a mere incident, almost forgotten, and when remembered it was created as an advisory body to the League of Nations. The atmosphere, the objective, the gathering itself were wholly unlike those prevailing at the Hague Conferences and in no sense of the word could the Conference at Paris be regarded as a continuation of the idea which was embodied in the Hague Conferences.[10] On the contrary, the Peace Conference at Paris broke the continuity of the idea of peace as developed at the Hague Conference, by reason of its introduction of militaristic and punitive measures.

[9] Chap. XXXV; p. 663.

[10] Of the spirit pervading the Peace Conference at Paris, Mr. David Jayne Hill wrote:

"There were present neither the forces, nor the motives, nor the atmosphere for establishing an institution of justice. * * * Political adjustments and not the creation of an institution of justice were the main purpose of the Conference. From the nature of the circumstances, jurisprudence could not be the controlling influence in its procedure. The utmost that could be conceded to it was that it might eventually have its day." (*Am. J. Int. Law,* July, 1920; p. 388.)

The Advisory Committee of Jurists in a measure undertook to repair the breach, but the League again destroyed the continuity;[11] for there appears to be little similarity between the Hague Conferences and the Assembly of the League, which has been likened unto a Hague Conference, meeting annually. A comparison of the agenda of the Assembly and that of the Second Hague Conference, and a perusal of the annual report of the Secretary-General to the Assembly must convince the most skeptical that the functions of the Assembly and the Council, and those of the Hague Conferences are widely different, and the former are neither a continuation nor a substitute for the juridical body of 1907.[12]

THE HAGUE CONFERENCES AS A STARTING POINT AFTER THE WAR

At the close of the war, the Second Hague Conference constituted the farthest international point of advance in the settlement of disputes by law. When the Council of the League was authorized by the Peace Conference to prepare plans for a court, it was but natural to assume that the Hague Conferences would be used as a basis of discussion for further progress. When the Committee of Jurists was appointed to prepare a draft scheme for the court, Mr. Root, a member of that body, naturally supposed that the Conferences would be used as a starting point. In that belief, at the opening of the session of the Committee, he proposed a resolution, recognizing the work of the Hague Conferences as a basis for discussion.

But the Committee had before it a number of proposals of which the Hague scheme of 1907 was but one. One of these plans was submitted by the Secretariat of the League; a second, known as the Five Power Plan, was prepared by the Swedish, Danish, Norwegian, Swiss, and Netherlands Governments; while a third scheme came from Austria and Germany. Nevertheless, Mr. Root urged that the plans of the Hague Conference of 1907 be used as a starting point to continue the development of the international idea for the settlement of disputes by law, and that all other plans be considered in connection with this primary plan. His purpose, as stated, was twofold—to give notice to the world that the Committee would consider its task, not as an expression of individual opinion, but under a sense of duty to build upon the basis of past development; also there was "throughout the entire world much respect for the work done at the Hague in the Conferences of 1899 and 1907"; and the Committee should make clear

[11] Chap. XXV; pp. 449-451.

[12] Chap. II; pp. 37-40, for functions of Assembly and Council.

the relation it bore to that work and all that was accomplished there.[13] The second purpose was to use the work of the Peace Conferences as a basis of discussion to indicate that the feelings and opinions *of all people* were to be considered, for all were represented in the Hague Conferences; and thus, it would carry to the people of all countries the idea that their conclusions were to be used as a basis for further progress. The Committee of Jurists, however, was not in sympathy with this proposal. The resolution proposed by Mr. Root, as amended by the Committee, follows: [14]

Root Resolution

"That the Committee adopts as the basis for consideration of the subject referred to it the Acts and Resolutions of the Second Peace Conference at the Hague in the year 1907.

"That the provisions of the several plans for an International Court of Justice already elaborated by representative jurists of Sweden, Denmark, Norway, Holland, Switzerland, Germany, Austria, be laid before the Committee and considered as the subjects to which they respectively relate are taken up for consideration."

Committee Resolution

"The Committee starts its deliberations by paying homage to the two Hague Conferences which have already prepared, with an outstanding authority, the solution of the problem of the organization of the Court of International Justice.

"The Committee is prepared to take into consideration also the schemes emanating from several governments, from conferences summoned at the initiation of governments, from international scientific organizations and from jurists of all nationalities, the works of which have preceded those of the Committee. The Committee will avail itself of all the sources of information which are, at the present moment, at its disposal in order thus to fulfil the object for which it has been summoned by the League of Nations."

In support of the substitute resolution, M. de Lapradelle (France), pointed out that it would be imprudent for the Committee to identify itself with any given plan, but it should study all schemes placed at its disposal and then forget them and set to work, for he believed the work of the Committee should be entirely independent. Lord Phillimore (Great Britain) desired to have respect paid to the Hague scheme of 1907, but thought nothing further should be implied. The President of the Committee, Baron Descamps (Belgium), thought that as the Hague Conference of 1907 could not agree upon two important points, it would not be desirable to adopt that plan as a basis of discussion. Signor Ricci-Busatti (Italy) thought that only in a general way should

[13] *P. C. of I. J., Advisory Committee of Jurists;* p. 23.
[14] *P. C. of I. J., Advisory Committee of Jurists;* pp. 41 and 43.

there be a connection between the work of the Committee and the Hague Conferences.

Although this attitude was seemingly in accord with the instructions of the Council that the Committee of Jurists was to construct an organ of the League in accordance with the Covenant and not to revive the Hague Organization and ideas, the jurists found it difficult to escape from the conclusions reached by the Conference of 1907. They therefore adopted its trend of progress in relation to obligatory jurisdiction and codification of law. The Council, however, was of the opinion that these recommendations, however much they might represent the Hague achievements, clearly went beyond the Covenant and it therefore manoeuvred a retreat. In view of the allegations constantly made that the League has continued, if not surpassed, the policy of the Hague Peace Conferences, it is important to examine the nature of that progress in relation to the maintenance of peace.

The advance of the Hague Conference of 1907 over that of 1899 is to be found first in its attitude toward obligatory jurisdiction, the following declaration having been adopted: [15]

"The Conference,

"Actuated by the spirit of mutual agreement and concession characterizing its deliberations, agrees upon the following declaration, which, while reserving to each of the States represented full liberty of action as regards voting, enables them to affirm the principles which they regard as unanimously admitted:

"It is unanimous,

"1. In admitting the principle of obligatory arbitration.

"2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to obligatory arbitration without any restriction.

"Finally, it is unanimous in proclaiming that, although it has not yet been found feasible to conclude a Convention in this sense, nevertheless the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months, the collected Powers not only have learnt to understand one another and to draw closer together, but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity."

The Hague Conference proposed also a Court of Arbitral Justice which contained a provision for obligatory jurisdiction over certain specified classes of disputes as follows: [16]

[15] *The Proceedings of The Hague Peace Conferences,* 1907, Vol. I; p. 572.

[16] James Brown Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists;* p. 181.

"It [the Court] is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in case of:

"1. A dispute covered by a general treaty of arbitration concluded or renewed after the present Convention has come into force, providing for a *compromis* in all disputes, and not either explicitly or implicity excluding the settlement of the *compromis* from the competence of the delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to compulsory arbitration, unless the treaty of arbitration confers upon the arbitration tribunal the power of deciding this preliminary question."

The Committee of Jurists embodied the substance of these provisions in Article 33 of the Draft Scheme, together with their recommendation for a fixed personnel of the Court, thereby constituting a juridical institution. The Council destroyed this juridical concept when it retained the fixed personnel and rejected obligatory jurisdiction. The Court of Justice is therefore neither a judicial institution nor an arbitral institution, whereas the Court of Arbitration retains all of the homogeneity and consistency of an arbitral tribunal.

The Conference of 1907 made considerable progress in agreements upon international law concerning warfare. It drafted and approved of fifteen conventions dealing with arbitration, hostilities, laws and customs of war on land and sea, rights and duties of neutral powers, bombardment, explosives, and other matters.[17] As these conventions were understood only to be a beginning, it was natural that the Advisory Committee of Jurists should make provision for carrying on this work, and to this end submitted a resolution providing for periodical conferences on international law. This scheme, also, the League rejected, thereby destroying the continuity begun with the Institute of International Law in 1873. The conventions negotiated under the auspices of the Council, comprising ten states and dealing with commercial and social questions rather than with questions of war, can hardly be regarded as a substitute for the Hague Conventions.[18]

RELATIONSHIP BETWEEN THE TWO COURTS AND THE LEAGUE

Not the least of the problems confronting the jurists was the question of what to do with the Permanent Court of Arbitration which was in

[17] A description of these conventions will be found in the *Proceedings of the Hague Peace Conferences,* 1907, Vol. I.

[18] For partial list of conventions negotiated under the auspices of the Council, see p. 452. The Treaty of Mutual Assistance undertook to deal with the question of disarmament, going far beyond the provisions of the Hague conference, but the indications are that it will not be accepted.

full working order and with a creditable record of achievement. The question of relating it to the Court of Justice was therefore important. The dilemma presented was the following: The Court of Arbitration could not be abolished for only its own signatories could accomplish that end and certain states signatory to its creation were not members of the League. It should not be given a position of too great prominence lest it overshadow the Court of Justice. It should therefore be reduced to impotence and if possible be incorporated within the League system for such purposes as the Council might determine. Article 1 of the Draft Scheme therefore provided that the Court of Justice should be in addition to the Court of Arbitration organized at The Hague, and that states were always at liberty to submit their disputes for settlement to this tribunal. The gathering within the League of some of the signatories to the Hague Convention of 1907 has, however, diverted their allegiance to the Court of Justice in accordance with the obligations assumed under Articles 12 and 13 of the Covenant.

The next problem was how to bring the Court of Arbitration, thus recognized, into the proper subordinate relationship to the League in order that it might not prove a competitive organization. It will be recalled that Mr. Root pointed out to the Committee of Jurists that the position to be accorded to this Court should come at the beginning of the procedure and not at the end, otherwise the part played by the Council and Assembly would be too reduced. This observation became a reality when the national bodies represented in the Court of Arbitration were chosen to name the list from which the Council and Assembly elect the judges for the Court of Justice. There were some people who believed that the Court of Arbitration would be encouraged to settle actual disputes, as it had hitherto done, while the Court of Justice would be engaged with legal questions concerning the interpretation of treaties, and other questions of law. Neither ideal has been realized. The Council has retained jurisdiction over the settlement of disputes through submitting them for advisory opinions and through the use of committees of jurists, thus frustrating the realization of this ideal for the Court of Justice; and by reason of the application of Articles 12 and 13 of the Covenant under which member states are under obligations to resort to League machinery, the Court of Arbitration has received no disputes for arbitration.[19]

The precise relationship therefore between the two Courts is that the

[19] Two controversies begun before the war have been adjudicated during the life of the League and the United States and Norway have settled the Norwegian Ship case by resort to an independent arbitral tribunal. (See p. 507.)

Court of Arbitration remains unimpaired, is independent, and is as competent today to settle any dispute submitted to it as it has proved to be in the past; and that its national bodies furnish lists for the election of judges to the Court of Justice. Both courts suffer from the restrictions of the Council and from the disinclination of states to submit disputes; but either is fully equipped to settle any dispute which may be submitted to it.

There is also confusion concerning the particulars in which these two Courts differ and in which they resemble each other; also with regard to their relative competence in the matter of preventing war; and finally as to the relative weight of their authority in such matters as may be submitted to them. The following analysis is an attempt to clarify thought concerning these matters.

THE PERSONNEL OF THE COURTS

The Hague Convention for the Settlement of International Disputes of 1907 provides for a panel of judges selected by the contracting powers, each of whom selects at the most four persons of known competency in questions of international law, of high moral reputation and available for duty. These persons are inscribed as members of the Court. They are appointed for a term of six years and their appointments are renewable. When the contracting parties desire to submit a dispute the judges must be selected by agreement from this list, but failing in such agreement the procedure is as follows:[20]

"Each party appoints two arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These arbitrators together choose an umpire.

"If the votes are equally divided, the choice of the umpire is intrusted to a third Power, selected by the parties by common accord.

"If an agreement is not arrived at on this subject each party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

"If, within two months' time, these two Powers can not come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be umpire."

It will be observed that the personnel of a tribunal may be different for each case submitted and that states may take into consideration a number of factors in selecting such tribunal.

[20] Scott, *The Hague Court Reports;* p. LXIII—Art. 45.

The personnel of the Court of Justice is selected in a different manner. A list of persons is nominated by the national groups in the Court of Arbitration and by national groups appointed for the purpose by such governments as may not be members of the Hague Organization. Each group may nominate not more than four persons, possessing qualifications not unlike those prescribed for members of the Court of Arbitration. From this panel the Assembly and the Council, each balloting separately, elect eleven judges and four deputy judges for a period of nine years. Vacancies are to be filled in the same manner.[21]

Among the advantages claimed for this fixed personnel are the following:[22] (1) That the Court is permanent and readily available. (2) That its decisions will constitute a body of law and precedent. (3) That it will expedite justice and the settlement of disputes; and (4) that such a court will command a confidence and respect, not hitherto accorded to arbitral tribunals, and will therefore invite the submission of disputes by parties.

The contention that a permanent personnel sustains these advantages over a personnel selected by the states for each case, admits of a division of opinion. On this point Prof. Borchard observes that "the only chance of securing a respectable docket for the Court lay in the provision of obligatory jurisdiction. Without it the fixed personnel is a source of weakness rather than of strength."[23]

One of the sources of strength of the Court of Arbitration has undoubtedly been the willingness of states to submit the merits of their disputes to a tribunal where they could select and challenge the judges and thus guard against national prejudices or temporary states of feeling. Public questions frequently cause temporary states of hostile feeling of nations toward each other; wars may take place among states whose nationals occupy permanent places in the Court. These or other temporary changes in relationships among states may influence states to decline to submit disputes to a court wherein the judges could not be selected. Thus at present were the United States to submit a question to arbitration as between itself and some other state, it might well hesitate to go before a court containing nationals known to be unsympathetic toward its immigration policy, in the apprehension that such a state of mind might influence judges in the consideration of other questions affecting this country. It is not impossible that the new

[21] For procedure in elections, see Statute, Annex II.
[22] See Chap. XXV, p. 464, for opinion of Prof. Borchard.
[23] *North American Review;* July, 1923.

defensive military alliances will have an unfavorable reaction upon the manner in which the permanent personnel of the Court is regarded. States against which these alliances are being formed would perhaps be more willing to trust their disputes to arbitral tribunals, composed of known neutrals, than to a bench containing the nationals of states which had arranged military alliances against them.[24] In this connection it should be recalled that the Court renders its decision by a majority vote wherein one vote may decide the issue. In his note of refusal, in the matter of Eastern Carelia, M. Tchitcherin pointed out that no court could be impartial when a majority of its members belonged to Powers which had not yet accorded recognition to Russia appearing before it, which Powers, sitting in another body, had rendered decisions adverse to Russia and without consulting that country.

It would seem also that parties to disputes are inclined to place less confidence in a court with a permanent personnel than in an arbitral tribunal which they choose. In the Grisbadarna Case in 1908, Norway and Sweden entrusted to the tribunal chosen, the question of interpreting a treaty and of fixing the boundary line; in the Island of Timor Case, between the Netherlands and Portugal, there was an agreement reached upon the delimitation of a boundary which was embodied in a diplomatic convention; in the North Atlantic Fisheries Case, Great Britain and the United States agreed to the establishment of a mixed tribunal to deal with local questions arising on the spot; and in the Japanese House Tax Case in 1905, the question of the rights of nationals under Treaty provisions was interpreted by the tribunal. But how different has been the attitude toward the Court of Justice. In September, 1923, the Allied Powers on the Council limited the Permanent Court in the Jaworzina Case to a legal question, restraining it from fixing the boundary in accordance with its opinion; in February, 1923, in the Tunis and Morocco Case, France and Great Britain, having ascertained that their dispute was international, one declined arbitration and the other refused judicial intervention.

That states will make such discriminations when the personnel is unchanging and therefore may not be regarded as impartial is already apparent. In 1912, under the Court of Arbitration, Russia did not refuse arbitration in the Russian Indemnity Case in its dispute with Turkey; and in 1905, it accepted a Commission of Inquiry in the Dogger Bank Case, in its dispute with Great Britain. But, in 1923, it did

[24] Chap. XXXVI; p. 709.

refuse to appear before the Court of Justice in the Eastern Carelian Case, on precisely the above ground.[25]

In the matter of the eviction of the German settlers from Poland, the Court was not entrusted with the duty of establishing mixed commissions to assure to the settlers the restoration of the land or to fix just compensation; although in the North Atlantic Fisheries' Case, such commissions were authorized to insure justice on the spot. A comparison of the disputes submitted to the two Courts indicates that in the Court of Arbitration, tribunals were empowered to decide the merits of the case and to render a decision which enabled the parties at once to settle their dispute; but under the submission of disputes to the Court of Justice where it advises the Council how to settle a dispute, there are varied interpretations of the opinion and extended negotiations as to its application, all of which detract from the prestige and dignity of the Court of Justice.

It is therefore open to question: (1) Whether a fixed personnel will not restrain states from submitting disputes to a court upon which there may be nationals of unfriendly powers; (2) whether states or the Council may not unduly restrict the jurisdiction of the Court, in framing the *compromis;* (3) whether important disputes will not be reserved increasingly for negotiation or special arbitral tribunals; and (4) whether the policy of requesting advisory opinions in actual disputes will not bring the Court of Justice, through no fault of its own, into disregard as a juridical body.

A practice has been followed by the Council which may still further affect the usefulness of a court with a fixed personnel but without obligatory jurisdiction. Under the rules of the Court of Arbitration, a party to a dispute is always assured of having a national on the tribunal; it cannot be otherwise without its express consent. Under the Statute of the Court of Justice, a similar right is granted to states that are parties. Under the practice adopted by the Council of submitting actual disputes to the Court of Justice, in the guise of a request for an advisory opinion, states may be deprived of this right unless they already have a national on the bench.[26] Thus, in the Jaworzina Case, the Allied Powers each had a national on the bench when their decision of 1920 was in question, but Czechoslovakia and Poland, the disputants over Jaworzina, had no national on the bench.[27]

[25] Chap. XXIX; p. 559.

[26] Chap. XXIX; p. 446.

[27] The Court sustained the decision of the Allied Powers acting as the Conference of Ambassadors.

It may also be questioned whether a court acting in an advisory capacity to the League of Nations will bring about a more expeditious disposition of a controversy than a court of arbitration acting independently. The following table illustrates the time required through the combined work of the Council and the Court for the settlement of five questions, involving actual disputes, and the time required for the settlement of the one dispute submitted directly to the Court for a final judgment:

ISSUES BEFORE THE COUNCIL AND THE COURT OF JUSTICE

Dispute	Complaint	Reference to Court	Opinion of Court	Decision of Council	Time
*Tunis and Morocco.	August 11, 1922.	October 4, 1922.	February 7, 1923.	Not returned to Council. (settlement by parties).	6 months.
Eastern Carelia.	November 26, 1921.	April 27, 1923.	July 23, 1923.	September 27, 1923.	19 months.
German Settlers.	May 26, 1921	March 2, 1923.	September 10, 1923.	June 17, 1924.	3 year 1 month.
Acquisition of Polish Nationality.	November 12, 1921.	July 7, 1923.	September 15, 1923.	Pending.	To date (July, 1924) 2 years, 9 months.
*Jaworzina.	August 31, 1923.	September 27, 1923.	December 6, 1923.	March 12, 1924.	6½ months.
Wimbledon.	(Allied Powers, January 16, 1923.)		August 17, 1923.		7 months.

It may be seen that the time required by the Court was in each case respectively: four months out of six; three months out of nineteen; six and a half months out of three years and one month; two and a half months out of (to date) two years and nine months; two and a quarter months out of six and a half; and seven months out of seven. The delays occurred primarily in preliminary examinations by the Council and interpretation and application of the opinions of the Court. In the Court of Arbitration the time required for the disposition of fourteen cases, between the date when the parties agreed to arbitrate and the date of the award which resulted in final settlement was as follows:

* Extraordinary sessions of the Court were called.

CASES DECIDED BY THE HAGUE TRIBUNALS OF ARBITRATION

Dispute	Date of Agreement	Date of Award	Time
The Pious Fund Case.	May 22, 1902.	October 14, 1902.	5 months.
The Venezuelan Preferential Case.	May 7, 1903.	February 22, 1904.	9½ months.
The Japanese House Tax Case.	August 28, 1902.	May 22, 1905.	2 yrs. 9 months.
The Muscat Dhows Case.	October 13, 1904.	August 8, 1905.	10 months.
The Casablanca Case.	November 10, 1908.	May 22, 1909.	6½ months.
The Grisbadarna Case.	March 14, 1908.	October 23, 1909.	19 months.
The North Atlantic Coast Fisheries Case.	January 27, 1909.	September 7, 1910.	19½ months.
The Orinoco Steamship Co. Case.	February 13, 1909.	October 25, 1910.	20 months.
The Savarkar Case.	October 25, 1910.	February 24, 1911.	4 months.
The Canevaro Case.	April 25, 1910.	May 3, 1912.	2 yrs. ½ month.
The Russian Indemnity Case.	July 22, Aug. 4, 1910.	November 11, 1912	2 yrs. 3½ months.
The *Carthage* Case. / The *Manouba* Case.	March 6, 1912.	May 6, 1913.	1 yr. 2 months.
The Island of Timor Case.	April 3, 1913.	June 25, 1914.	1 yr. 3 months.

The parties involved in the cases referred to in the first table were: Czechoslovakia, Finland, France, Germany, Great Britain, Poland and Russia—all European countries. The cases in the foregoing table involved: France, Germany, Great Britain, Italy, Japan, Mexico, Netherlands, Norway, Peru, Russia, Sweden, Turkey, United States and Venezuela.[28] The fact that some of the parties involved were from continents other than Europe added considerably to the time required in collecting information, but even so in many cases the time record of the Court of Arbitration compares favorably with that of the League system of Council and Court of Justice combined.

This comparative statement would indicate: (1) That where a matter is submitted directly to the Court of Justice by the parties, or where the League is used only as a channel of communication, the expedition under the permanent personnel will compare favorably or will exceed that of a chosen personnel for each dispute; but where the Council as mediator interposes between the parties and the Court, the delay may be greater than where the parties agree to refer a matter directly to the Court of Arbitration.

If there has been a prevalent belief that granting to a court a

[28] For details of cases, see *The Hague Court Reports*, by James Brown Scott.

permanent personnel creates a judicial tribunal or that its decisions thereby constitute a judicial rather than an arbitral settlement, the record of the Court would seem to dispose of the theory. In eight of the nine matters referred to it, the part it has taken in settling the dispute has been less than that of an arbitral tribunal, in that it but rendered an opinion to another arbitral body charged with the settlement of the dispute. In certain instances the Court was proscribed from examining the merits of a dispute which is the function of a judicial body. In the one instance where it rendered a judgment, there existed in the Treaty a form of compulsory jurisdiction and the case involved a disarmed state unable to exercise any sovereign rights, such as Russia demonstrated in the case of Eastern Carelia. The record of the questions before the Court indicates that something more than a permanent personnel is required to give to a court the essential character of a judicial tribunal.

RELATIVE WEIGHT OF AUTHORITY OF THE TWO COURTS

An arbitral body makes a report or an award; a juridical body renders a judgment or gives an opinion to a qualified legislative or executive branch of the government of which the court is a part. Under these circumstances there can be no question that a weight of authority attaches to the latter.

Nevertheless, the record of the two Courts does not entirely support this general fact. In the fourteen cases before the Court of Arbitration before the war, in each and every instance the award was accepted by the parties and there has been no formal complaint as to non-execution. In addition, three disputes have been settled by arbitral tribunals since the war. On September 2-4, 1920, the Court of Arbitration made an award in the claims of France, Great Britain and Spain against Portugal. The claims were paid and the dispute settled. On October 11th, 1921, the Court of Arbitration made an award in the case of the French claims against Peru; the award was accepted. On February 13th, 1923, a special arbitral tribunal made an award against the United States in favor of Norway, involving $12,239,852.47. On February 25th, when the United States Treasury forwarded a check for this amount, the Secretary of State protested, stating that certain principles of international law appear to have been violated, but that this Government would accept the decision in order to uphold the principles of arbitration, while not desiring to accept the award as a precedent.[29]

[29] *Am. J. Int. Law,* April, 1923; p. 287.

The Court of Justice has rendered one judgment (the Wimbledon case); and eight opinions. Three opinions concerned administrative affairs of an organization within the League, and were accepted. Five concerned actual disputes. In one, a party defied the Court (Russia); in a second, one of the parties declined to submit the merits of the case to the Court (Great Britain); in a third, the question was cut in two, the question whether the decision of the Conference of Ambassadors was final being referred to the Court; and whether the Delimitation Commission exceeded its instructions remaining with the Council—both being legal questions *per se;* in a fourth, the opinion of the Court was deliberately violated by a party (Poland) and an ultimatum as to the form of settlement delivered to the Council; and in a fifth, the execution of the opinion has been made the subject of arbitration (acquisition of Polish Nationality). The elaboration of the final settlement of disputes after an opinion has been given by the Court cannot but detract from the competence and authority of the opinion of the Court when it becomes a part of general mediation.

It may also be observed when the parties appear before a tribunal in the Court of Arbitration, efforts toward conciliation are permissible in the presence of the judges and with their approval, and the agreement reached is accepted as final. When the parties appear before the Court of Justice there is no process of conciliation, but after the Court renders its opinion advising the Council upon the settlement of the dispute, conciliatory processes may be begun over the interpretation or application of the terms of the opinion, over which a political body presides. Under these conditions, the judicial functions of the Court appear to constitute a kind of accessory to the function of mediation exercised by the Council. Thus, in the case of the German settlers there began a process of inquiry and conferences and a verdict by a committee of jurists; then more endeavors toward conciliation, followed by an opinion by the Court, whereupon conferences were resumed, followed by adjudication of the opinion of the Court. In the meantime, most of the settlers had been evicted and the Council then decided they need not be reinstated, but that money compensation would be ample justice.

The policy of the Council in submitting actual disputes for advisory opinions, thus placing itself between the parties and the Court, tends to make the Court of Justice a less authoritative body than the Court of Arbitration. Whenever the opinion of the Court is but a link in a series of events in which the Council plays the leading part, there will be a tendency to regard the whole procedure as political rather

than juridical; whereas in the Court of Arbitration, political influences of other countries, unless they intervene as parties, does not obtain. Furthermore, the limitation of eight-ninths of the business of the Court of Justice to advising the Council as to the settlement of a dispute which the Court is much better equipped to decide on the basis of law and equity does not accord a high degree of either prestige or dignity to the juridical body.

In the effort to promote the Court of Justice at the expense of the Court of Arbitration, there is a tendency to attach a weight of authority to the Court of Justice which the facts do not support.[30] So long as the Council insists upon its prerogative of first examining disputes, of transforming actual controversies into questions for advisory opinions, and follows the policy of sharing with the Court the settlement of each dispute; and so long as the Allied Powers ignore the Court, and the Council considers itself to be the supreme interpreter of the Covenant and of the Peace Treaties when the Conference of Ambassadors is not performing that function, the weight of authority attaching to the Court of Justice will hardly approximate that already achieved by the Court of Arbitration.

ADVISORY FUNCTIONS

The competence of the Court of Justice to deliver advisory opinions to the Council and Assembly has no counterpart in the Court of Arbitration and is the most significant differentiation of the two Courts. The Court of Arbitration deals only with parties in international disputes and not with an intermediary organization interposed between itself and the parties. The Court of Justice renders advisory opinions upon actual disputes not to the parties but to an intermediary organization. In explanation of this practice it has been said:[31]

[30] The following are illustrations of such efforts:

"The thing we call the Permanent Court of Arbitration is nothing but a roster of one hundred and thirty-two names." (Address by Manley O. Hudson, member of the League Secretariat, before the Chicago Council on Foreign Relations, December 29th, 1923.) This characterization does not do justice to the 97 articles which govern the procedure of the Court nor to its impeccable decisions which have contributed to peace.

"However, I think in other countries the Permanent Court of Arbitration probably does not have the standing that it has in this country. Other countries have not used it as frequently as we have." (Testimony given by Mr. Hudson before the Sub-Committee of the Senate Foreign Relations Committee, May, 1923.) The record of such use was as follows: France, 9; Great Britain, 7; Italy, 5; the United States, 4.

[31] Address by Mr. Hughes, Secretary of State, April 27, 1923, before the American Society of International Law.

"The Court recognizes that it may be called upon by the Council or Assembly of the League for advisory opinions. This is a practice similar to that which has obtained in most of the States of New England from Colonial days. It now obtains in Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado and South Dakota. The Permanent Court of International Justice has adopted rules upon this subject so as to assimilate the process so far as possible to a judicial proceeding, and especially so as to exclude any supposition that advisory opinions may be rendered in a diplomatic sense and without publicity."

It may be pointed out that this practice is a state and not a federal practice, and is not general throughout the United States. An examination of these various constitutions, however, indicates the purpose of these opinions to be "that the Governor shall have authority to require the opinion of the judges of the Supreme Court upon important questions of law involved in the exercise of his executive powers and on solemn occasions." [32] If it is contended that the procedure followed by the Court in rendering advisory opinions to the Council is analogous to the above procedure, it is permissible to infer that the Court constitutes the judicial organ of the League and is advising component parts of the League Government, as established by the Covenant.

But this has not been the purpose for which these opinions have been sought. For such opinions the Council has constituted committees of jurists. Opinions from the Court have been sought by the Council to settle actual controversies which it was the juridical business of the Court to settle. It is not recorded that any executive of any American state has sought such an opinion to obtain advice on the matter of settling a dispute for which the state constitution provides courts. The Covenant provided a court to settle disputes; but the executive branch, namely the Council, obtains advisory opinions upon these disputes enabling it to compete with its own court, and to exercise discretion in the application of that opinion. Six out of the eight opinions rendered by the Court dealt with matters in which a judgment was the proper procedure.

JURISDICTION

It is frequently pointed out that the Court of Justice possesses advantages in other respects, in that, for instance, its jurisdiction is broader. The Court of Arbitration may hear any dispute or only disputes of a certain category, any existing questions, or one which may arise eventually, and is competent for all arbitration cases which

[32] Constitution of the State of South Dakota (Art. 13): other constitutions include the legislature.

the parties submit, unless they agree to institute a special tribunal. The jurisdiction of the Court of Justice comprises all cases which the parties submit to it, and all matters especially provided for in the treaties and conventions in force. It may also give an advisory opinion upon any question. These two last clauses enlarge the jurisdiction of the Court of Justice beyond juridical boundaries, and it may be questioned whether this is an advantage, inasmuch as it tends to make the Court of Justice a vehicle for other matters than interpreting and applying law, and to that extent detracts from its prestige as a juridical body.[33]

The Court of Justice possesses a certain jurisdiction conferred by the parties, as, for instance, under the Peace Treaties and Minority Treaties where one of the signatories can set this jurisdiction in motion.[34] The optional clause also confers a jurisdiction which the parties, however, may make conditional as to time and reciprocity. The Court of Arbitration also possesses a compulsory jurisdiction conferred by the various conventions which contain arbitration clauses to that effect.

In both instances, however, it should be noted that any form of jurisdiction conferred upon the Court by agreements between parties may be legally abrogated or altered by either party at will; whereas jurisdiction conferred in general conventions such as the Court Statute or agreements entered into by many parties are not so easily abrogated or changed, since they require the consent of all signatories.

There is a peculiarity in the jurisdiction conferred by the Minority Treaties which should not escape notice in estimating the competence of the Court. Under the obligatory jurisdiction clause in the Court Statute, an aggrieved party may bring questions affecting any other signatory of the clause before the Court. But in the Minority Treaties, for instance, which are said to confer obligatory jurisdiction upon the Court, the aggrieved party, namely, the oppressed minority, can only have its wrongs redressed by proxy; that is, only when one of the signatories to the Treaty, which signatory may not be interested or involved in the controversy, is kind enough to bring the matter before the Court. Thus far, the jurisdiction which the Minority Treaties confer is ephemeral, for no Allied Power has invoked it on behalf of any one of the Minorities which they have created. Thus, in the matter of the German settlers, although any one of the Allied Powers could have conferred

[33] Chap. XXV; p. 459 (Duties under the Lausanne Treaty).

[34] See: *P. C. of I. J., Series D, No. 3,* for collection of Treaties and agreements affecting the jurisdiction of the Court.

jurisdiction upon the Court by laying the matter before it, the Council labored for more than a year to obtain Poland's consent to submit a matter which that country had already agreed to submit automatically when a signatory called upon it to do so. There may, therefore, be many steps between the clauses conferring such jurisdiction and its exercise by the Court.

THE COMPROMIS

Another distinction between the two Courts is that under the Court of Arbitration the parties themselves and they alone may frame the question for submission, and into its formulation enter only their specific and avowedly national interests. But in eight of the nine questions before the Court of Justice the question was not framed by the parties in interest, but ten states had to be satisfied as to its phraseology, any one of which could have prevented its submission in a form not agreeable to it. Therefore, any state or international body desiring an advisory opinion must receive the approval of the Allied Powers before it can proceed with a question to the Court; and may have the matter submitted in a form contrary to its wish. Thus, in the agricultural labor cases, the question was rejected as framed by Director Thomas, representing the Governing Body of the International Labor Office and naturally the most interested party, since its powers were to be freed or restricted by the Council; and the form preferred by France was adopted. In the matter of agricultural production, the question was framed by the Council over the vehement protest of Director Thomas. In the case of the Netherlands Delegate, that country sought in vain to change the question submitted to the Court, upon which it had never been consulted. This discrimination, whereby the interest of one party but not that of the other is considered in framing a question, could not occur in any proceeding before the Court of Arbitration.[35]

PROCEDURE

It is sometimes alleged that the Court of Justice possesses a definite procedure, while that of the Court of Arbitration is indefinite and may be changed by the parties in each case. This contention is subject

[35] Article 63 of the Convention for the Pacific Settlement of International Disputes states that the Court of Arbitration is competent to frame the *compromis* when the parties agree or upon the request of one of the parties, when a treaty of arbitration does not expressly exclude such competence by the Court. The United States Government in ratifying the Convention exercised this right in a general exclusion of the competence of the Court, thus retaining the full right to make such *compromis*.

to two observations. The first is that both courts have a prescribed procedure and that both permit the parties to modify this procedure, the Court Statute having been altered in this respect when the League added a new paragraph to Article 38.[36] The second observation is that each Court is part of a system in which the procedure varies. In the Hague Organization, a dispute may be settled by mediation for which a procedure is provided;[37] or it may be settled by a commission of inquiry for which a procedure is prescribed;[38] or it may be settled by the Court of Arbitration.[39] An examination of the Convention for the Pacific Settlement of International Disputes indicates that the system of procedure for the settlement of disputes is both definite and correlated. Among the essential elements of the procedure for an *inquiry* are the following: that both sides must be heard; every investigation and every examination of a locality must be made in the presence of the agents or counsel of the parties or after they have been summoned; experts and witnesses are to be heard; strict rules govern the appearance and evidence of witnesses; and a report is to be made at a public sitting. The procedure governing arbitration provides also for the conduct of the case including the question to be framed by the parties, appointment of special agents, counsel or advocates, pleadings and oral discussions, counter cases, documents, information, and awards. Provision is also made for summary procedure.

In the League system of arbitration there are also three bodies designated to act as tribunals—the Assembly, the Council and the Court. The Court has adopted rules of procedure which correspond in thoroughness to those adopted by the Court of Arbitration. The Council and the Assembly have also adopted rules of procedure, but they do not contain any provisions for the conduct of arbitration or mediation in the settlement of disputes. Nor does the Covenant make such provision except that the interested parties shall be present, and concerning the form in which the Council shall report. Since the Court has been assigned the rôle of adviser to the Council upon such matters as that body refers to it, its opinion, rendered under a definite procedure, forms but a link in the proceedings which begin and end with the Council. But the arbitral procedure so painstakingly built up in the Hague Organization which has given to international arbitration a high order of integrity is nowhere approximated when the Council mediates in a

[36] Annex II, for text.
[37] Scott: *The Hague Court Reports;* p. xxxv.
[38] *Ibid.*, p. xli.
[39] *Ibid.*, lv.

dispute. Only the will of the Council determines whether both sides shall be heard (in the Saar disputes but one side has been heard); whether the experts of both sides may be present (in the Upper Silesian dispute they were not); whether the sessions will be public (in the Italo-Greek dispute they were both public and private); or whether agents of the parties may appear (in the German settlers case the settlers had no representative present). The absence of any known or formulated procedure which parties know in advance will govern the conduct of their case is not only a deterrent to the submission of disputes, but it breaks down the integrity of the whole arbitral system and substitutes therefor a loose kind of mediation where representatives gather about the table and each makes the best bargain he can.[40]

In view of the fact that the Council may make awards, that its reports and recommendations have the force of an award, and that states agree not to resort to war with a party that accepts them, this neglect to provide any procedure which recognizes the rules of law and evidence in the conduct of disputes is, as Mr. Root has said, "admirable for dealing with political questions, but is wholly unsuited to determining questions of right under the law of nations." And yet treaties have been interpreted, territory has been divided and minorities have been dealt with under the so-called arbitral proceedings provided in Articles 11, 12 and 13 of the Covenant.[41]

It may also be pointed out that a dispute submitted to the Court of Arbitration experiences a relatively simple procedure. When negotiations fail, and an agreement is reached to arbitrate, the *compromis* is drawn up by the parties, the judges selected and the matter presented and heard and the award given. But when negotiations fail among members of the League, and the parties agree to arbitrate, the matter first is submitted to the Council, ten states view the question from the angle of their special interests and then there begins a series of conferences, inquiries and investigations by the proper section of the Secretariat, reports and recommendations by *rapporteurs*, perhaps an

[40] On this point Mr. Root has observed: "The scheme [Covenant] practically abandons all effort to promote or maintain anything like a system of international law or a system of arbitration, or of judicial settlement, through which a nation can assert its legal rights in lieu of war. * * * It puts the whole subject of arbitration back where it was twenty-five years ago. Instead of perfecting and putting teeth into the system of arbitration provided by the Hague Conventions it throws those conventions upon the scrap heap." (David Jayne Hill, *Present Problems in Foreign Policy*, p. 120.)

[41] For illustration of the manner in which the vagueness of "conciliation" is substituted for the precision of arbitration, see Chap. XXXIII, p. 613. (Case of the Hungarian Optants.)

opinion by a committee of jurists, then more discussions by the Council, and at last a resolution sending to the Court not the precise question which the parties had in view, but as altered by the proceedings conducted by the Council. When the opinion arrives from the Court it has no validity until the Council accepts it and then the question of its proper application to the dispute may set in motion much the same processes which preceded the submission of the question to the Court.[42]

MEMBERSHIP

For the purpose of completing the record of differentiation, reference is made to the well-known fact that the Hague Organization is a world organization, comprising all of the leading nations of the world, including the United States, Germany, Russia, Turkey, and Mexico, and is open to all states without discrimination. It is in no way associated with special treaties negotiated by a part of its membership and operates under a convention to which all have contributed. The Court of Justice is not a world organization, nor can it become such without the consent of the Council of the League of Nations. A distinction is made between members and non-members of the League —the latter being permitted to use the Court only upon conditions prescribed by the Council. This right is reserved to the League in Article 35 of the Court Statute, subject only to the condition that such regulations shall not place the parties in a position of inequality before the Court.[43] Also, no member state not a signatory to the Versailles Treaty nor mentioned in the Annex, has yet been permitted to contribute to the Covenant; whereas all signatory states to the Hague Conventions have participated therein.

SANCTIONS

The two Courts differ as to sanctions. The Hague Organization may render a report through commissions of inquiry or an award through a court of arbitration and the sanction is vested in the parties who have agreed in good faith to accept the report or award. In either event, the report or award is rendered to the parties and they alone are responsible. The Court of Justice may render an advisory opinion to the Assembly or Council, or it may render a judgment to the parties. If the parties are members of the League the sanctions are vested in the League by virtue of Article 16 of the Covenant; unless the Treaty of Versailles specifies other sanctions. Nowhere in the Court Statute

[42] See German Settlers in Poland for a case in point (Chap. XXX).
[43] See Chap. XXV, p. 475, for regulations and discussion.

itself is there to be found any form of sanction, not even that of good faith, such as is provided in Article 37 of the procedure of the Court of Arbitration.[44]

The effect is different in each Court.[45] Under an award made by a tribunal of the Court of Arbitration, or under a judgment by the Court of Justice, the responsibility to accept that award rests squarely upon the parties. Under an advisory opinion, the responsibility rests upon the Council, which then endeavors to induce the parties to accept it, with such interpretations as they may agree upon.

LEGAL VS. POLITICAL QUESTIONS

It seems not improbable that any substantial values which the Court of Justice may contribute to the cause of peace are at a standstill until the question of what constitutes a legal and what a political question has been threshed out and a principle agreed upon. The Court of Arbitration escaped this difficulty to some extent through the good will of the parties in deciding between themselves what was justiciable and what was not. The word justiciable first came into international usage in the Knox-Bryce and in the Knox-Jusserand Treaties of arbitration. As used in those treaties and as understood by those who negotiated the treaties, the word was intended to cover all matters which were susceptible of adjudication under and in accordance with the principles of international law. It was immaterial that such a matter might affect the "honor or vital interest or independence" of a country. As a matter of fact, Great Britain and the United States have arbitrated questions affecting both their vital interests and their honor—the arbitration of the Alabama case at Geneva under the Convention of 1871 affected Britain's honor, and the arbitration of the North Atlantic Coast Fisheries under the agreement of 1909, affected a vital interest of the United States.

The words "honor or vital interests or independence" first appeared in the arbitration agreement between Great Britain and France of 1903. The negotiation of that Convention between those two countries marked a distinct advance in the pacific settlement of disputes as between those two powers.

A sub-Commission of the Hague Conference of 1907 undertook to classify justiciable disputes, and while some of the delegations could

[44] Scott: *The Hague Court Reports*, for text of Convention for the Pacific Settlement of International Disputes, 1899; 1907.

[45] For reasons for omission of all mention of sanctions from Court Statute, see Chap. XXV, p. 486.

agree upon a list of subjects suitable for arbitration, unanimous agreement could not be reached and the subject was postponed to a later conference. The difficulties in the way of such classification may be summarized as follows: (1) The inseparability of legal and political questions, inasmuch as at some time every dispute may have a preponderating quality of either; and in time of strain between countries the latter gradually gains the ascendancy. (2) In many controversies there is no known principle of law which can be applied to the question, owing to changes due to the war and to the lack of codification and clarification of international law. This lack would make it incumbent upon the Court "to legislate judicially" were disputes of this order submitted, which nations with constitutional governments are reluctant to admit.

In the absence of any precise definition, the true test of what is a legal and what is a political question depends largely upon the willingness of the parties to arbitrate. If they are willing to do so, a line of reasoning will support the theory that the question is legal; if they are unwilling to do so, an equally good line of reasoning will support the argument that the question is political.

Unfortunately the spirit since the war has led states to resort to technicalities of one kind or another to excuse their reluctance to submit disputes to arbitration. The Council has interpreted the provisions of the Treaty of Versailles in questions arising thereunder on the ground that they were political not legal; it has referred to a committee of jurists the question of its rights under the Versailles Treaty regarding Danzigers in Poland; it has decided a question of international law concerning the responsibility of a state for crimes committed within its territory. With the members of the Council setting such an example, other member states can hardly be expected to emphasize the justiciable aspects of a dispute. It would therefore seem that one of the duties of a body charged with a consideration of the codification of the principles of international law would include the question of what is justiciable or non-justiciable; and where a line of demarkation may be drawn between legal and political questions.

A classification of legal and political disputes is therefore held to be of fundamental importance as a part of the codification of law as recommended by the Advisory Committee of Jurists which prepared the Draft Statute for the Court of Justice. On this point Dr. David Jayne Hill wrote as follows:[46]

[46] *Boston Evening Transcript,* January 7th, 1924.

"What is of vital importance is that, if the world is to be governed by law rather than by force, the recommendation of the jurists should be followed and the conferences at The Hague should be resumed; for, unless the Permanent Court of International Justice is guided by a definite world law, it will fail to draw into its jurisdiction cases of great importance, either because of the facility with which merely litigious matters can be settled less expensively without resorting to it, or because of a suspicion that being without any definite law, except the Covenant, which aims at superseding judicial settlement by diplomatic expedients, the Court may be felt to be only a new device to govern by decree; that is, to make its own law in subordination to its own fundamental law, the Covenant of the League. From this point of view it is perhaps possible to comprehend why, instead of being a World Court guided by world law, it is preferred that the Permanent Court of International Justice should be the League's Court, not too much controlled by a code of law, and capable by its opinions to give an appearance of judicial authority to the decisions of the Council and the Assembly."

THE COURTS AS SUBSTITUTES FOR WAR

Extravagant claims are here and there made that the Court of Justice is a substitute for war. A similar claim was at one time made on behalf of the Court of Arbitration. Neither hope has been realized, for there has been no statute prohibiting war. The Hague Conventions, the Treaties of Peace, the Covenant, and the proposed Treaty of Mutual Assistance recognize war and seek but to regulate the methods and conditions of warfare. A court without a statute prohibiting war and without jurisdiction to bring aggressors of that law before it can not become a substitute for war, nor does it seem to be the first step in that direction. Furthermore, the situation is less favorable today from the point of view of these courts constituting the machinery of justice and security. The Court of Arbitration had no international rival; but the Court of Justice has rivals, including the Conference of Ambassadors, the Council, the Assembly, and international committees of jurists —all in favor of political rather than judicial settlements.

Furthermore, the manner of settling disputes during the past five years indicates less of a disposition to submit vital matters to arbitration.[47] The machinery exists, but it does not attract a Poland which can win Vilna by force; a Lithuania which has more chance in Memel with "irregulars" than at The Hague with a representative of each of the Allied Powers on the Court; nor has it drawn Italy away from the shores of the Adriatic Sea, nor France out of the Ruhr, nor Yugo-

[47] See Chap. XXXIV, p. 652, for summary of the questions in Europe conceived to be the test of good faith of those nations that espouse arbitration and decry wars as methods of maintaining peace. Also, Conclusion, p. 803.

Slavia and Greece from Albania; nor Poland from Eastern Galicia; nor brought together Russia and Roumania over Bessarabia. From troubled Central Europe the Allied Powers have brought only the infant Jaworzina to the Court of Justice. Where the issues are of a lesser degree of importance, mediation as practiced by the Council, may answer; but in the quest for territory, ports and waterways and commercial rights, each nation has thus far indicated a desire to be free to follow the nationalist trail wherever it leads.[48]

Therefore, it would seem that before preferring one court before another and before considering seriously the substitution of the Assembly of the League for the Hague Conferences, due weight should be given to the political spirit which actuates the League and to the scientific spirit which dominated The Hague Conferences; to the dominance of a few Powers in the Council and to the equality of Powers in The Hague Conferences; and that there be examined more thoroughly and with entire candor the relative values of the permanent personnel of the Court of Justice and the voluntary personnel of the Court of Arbitration; the position of the advisory opinion under the Court of Justice and the respect paid to the awards under the Court of Arbitration; the rights of the parties in the two Courts, the merits of the two forms of sanction, and of the two procedures whereby parties conduct their own suits before one court, or wherein they submit them first to a third party for intervention between themselves and the Court.

The two courts in their concept, organization and operation offer material for analysis and discussion of which this chapter is but a fragment intended to stimulate discussion.

[48] A memorandum submitted in June, 1924, to the United States Senate Committee on Foreign Relations by the *Foreign Policy Association* of New York, contained this statement:

"It is not too much to say that there will be no world court if this court cannot be made one and whether or not it is to be in the fullest sense a world court depends upon our own action." The foregoing record would indicate that unless France, Great Britain and Italy and other states which follow their example submit their controversies to the Court instead of settling them in the Conference or Council and in their foreign offices it will matter very little what the United States does. It is not the history of international relations that one country dictates to another how it shall settle its disputes.

CHAPTER XXVII

QUESTIONS AFFECTING INTERNATIONAL LABOR

In February, 1922, the Court of Justice was formally established; and in May, 1922, it received its first question from the Council of the League of Nations. The Council requested an advisory opinion on behalf of the International Labor Office. This Office was created under Part XIII of the Versailles Treaty and is established as part of the organization of the League.

WORKERS' DELEGATE FROM THE NETHERLANDS

This question concerned an interpretation of the Versailles Treaty, namely, whether the Workers' Delegate from the Netherlands to the Third Session of the International Labor Conference in 1921 had been nominated in accordance with paragraph 3 of Article 389 of the Treaty of Versailles. The provisions under which nominations take place are as follows:

"The members undertake to nominate non-Government Delegates and advisers chosen in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or work people, as the case may be, in their respective countries." (Par. 3).

"The names of the Delegates and their advisers will be communicated to the International Labor Office by the Government of each of the Members." (Par. 6).

"The credentials of Delegates and their advisers shall be subject to scrutiny by the Conference, which may, by two-thirds of the votes cast by the Delegates present, refuse to admit any Delegate or adviser whom it deems not to have been nominated in accordance with this article." (Par. 7).

Five Confederations of Trades Unions exist in Holland, as follows: The Netherlands Confederation of Trades Unions (218,596 members); the Confederation of Catholic Trades Unions (155,642 members); the Confederation of Christian Trades Unions (75,618 members); the Netherlands General Confederation of Trades Unions (51,195 members) and the National Labor Secretariat (36,038 members). All five were invited by the Minister of Labor of the Netherlands to confer upon the choice of a delegate to the International Labor Conferences held in 1919 in Washington, in 1920 in Genoa, and in 1921 in Geneva.

In 1919 and 1920, the first four organizations accepted the invitation of the Minister, but could not reach an agreement, and the Minister appointed as delegate a member of the Netherlands Confederation of Trades Unions. In 1921, the same procedure was followed, and the five Confederations were invited to appoint a delegate by mutual agreement. The first four accepted the invitation; but they could not agree upon a delegate as the first and largest organization considered that it was entitled, as heretofore, to name him. The other three organizations, attending the conference and aggregating 282,455 work people, as compared with the 218,455 of the largest organization, effected a combination and nominated the delegate whom the Netherlands Government appointed.

On October 3rd, 1921, the Netherlands Government notified the International Labor Office that it had appointed the delegate and advisers, as agreed to by the three organizations. On October 22nd, the Netherlands Confederation of Trades Unions protested to the International Labor Office against the seating of this delegate and of the advisers, on the ground that they had not been nominated in accordance with the Treaty, in that the Netherlands Government had conferred with more than one workers' organization instead of with the most representative organization.

Although similar questions had been raised at previous conferences, the difficulties had been amicably adjusted. For, on March 25th, 1920, the Governing Body of the International Labor Office interpreted Article 389 to mean: "that to all General Conferences of representatives (special or otherwise) non-government delegates should be chosen in agreement with employers' associations and workers' federations most representative of all sections of industry if such organizations exist.[1] But in this particular instance, the two organizations were international in character and were contending for the control of the workers. The issue, therefore, was one of considerable importance; for if the Court held that the Article intended that but *one* organization should be consulted, the Socialist and largest organization would exclude the Christian Labor Union movement which was more representative.

The question raised by this protest was whether a Government, in appointing a delegate, is bound to agree with the organization which has the largest membership or whether it may agree with organizations comprising among them more workers than the single organization. It was pointed out in a memorandum to the General Conference that if

[1] *P. C. of I. J., Series C, No. 1;* p. 84.

the latter is the correct interpretation it might open the door to governments opposed to properly constituted trade unions and lead to the creation of fictitious organizations solely for the purpose of sending delegates to general conferences, which they could do by combining memberships. The question, therefore, involved an interpretation of the meaning of "organizations" and of the "most representative" in relation to the most numerous.

This question was referred to the Credentials Committee of the Third International Labor Conference. It requested an opinion from an expert which was given on November 11th, 1921, as follows:[2]

"The Dutch workers' delegate has not been nominated in conformity with the terms of Article 389 of the Treaty of Versailles. Nevertheless, the General Conference of the Members of the International Labor Organization can take into account considerations of a different order from those based on juridical grounds, and is not obliged to refuse to admit him."[3]

The director of the Legal Section of the League, also consulted on this question, did not agree however, and rendered an opinion to the Credentials Committee on November 11th, 1921, in which he said:[4]

"It cannot be said that this procedure constitutes a violation of the explicit terms of paragraph 3 of Article 389, since this Article does not contain any conflicting provision."

In view of these divergent opinions, the Committee on Credentials proposed to the General Conference of the International Labor Organization that it admit the workers' delegate from the Netherlands upon the express condition that such action should not constitute a precedent. The Committee also proposed the adoption of a resolution to refer the question of an interpretation of Article 389 to the Court of Justice.

The General Conference seated the delegate; and on November 18th, 1921, adopted the following resolution, as suggested by the Credentials Committee:[5]

[2] *P. C. of I. J., Series C, No. 1;* p. 395.

[3] These grounds were explained as follows by the expert:

"The new system of giving to an international conference the right of controlling the nomination of delegates made by a government after consultation with certain of its nationals could only be admitted, provided that the Conference was at the same time in a position to allay the susceptibilities which might be hurt by this new method of procedure, which as a principle is necessary for the assurance of the sound working of the International Labor Organization." *(P. C. of I. J., Series C, No. 1;* p. 395.)

[4] *P. C. of I. J., Series C, No. 1;* p. 387.

[5] *Ibid,* p. 125.

"The General Conference of the International Labour Organization invites the Governing Body of the International Labour Office to request the Council of the League of Nations to obtain in accordance with Article 14 of the Covenant of the League of Nations, from the Permanent Court of International Justice an opinion as to the interpretation of Article 389 of the Treaty of Versailles and as to the rules which should be observed by the Members of the International Labour Organization, in order to comply with the terms of this Article in appointing non-Government Delegates and Advisers to the Sessions of the General Conference."

On March 17th, 1922, the Governing Body approved of this request, as contained in the resolution; and the Director of the International Labor Office forwarded the resolution to the Council in a letter, the first paragraph of which contained the following opening statement:[6]

"In pursuance of a resolution adopted by the International Labour Conference on November 18th, 1921, the Governing Body of the International Labor Office, at its eleventh session held at Geneva on January 17th-19th, 1922, instructed me to request the Council of the League of Nations to obtain from the Permanent Court of International Justice an opinion on a question which has arisen with regard to the interpretation of the provisions of the third paragraph of Article 389 of the Treaty of Versailles, concerning the appointment of non-Governmental delegates and technical advisers to take part in the sessions of the General Conference of the International Labour Organization."

The closing paragraphs were, however, as follows:

"Having considered a report on the question, the Governing Body, at its eleventh session, instructed the Director of the International Labour Office to make the necessary application to the Council of the League of Nations, in pursuance of the resolution adopted by the Conference.

"I have accordingly the honor to request that you will ask the Council of the League of Nations to be good enough to submit for the consideration of the Permanent Court of International Justice the question whether the workers' delegate from the Netherlands at the third session of the International Labor Conference was nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles."

It will be observed that the opening and closing paragraphs of this letter, which was to cause the submission of the first question to the new Court, were not in harmony. The first related to a theoretical question, which, according to the Advisory Committee of Jurists was a proper subject for an advisory opinion;[7] while the second related to an actual dispute involving the delicate question of the exercise of governmental discretion which the General Conference in its resolution had sought to avoid. Furthermore, the General Conference, by the terms of the Treaty, was constituted the supreme authority over the

[6] *P. C. of I. J., Series C, No. 1,* pp. 345-347. [7] Chap. XXIV; p. 441.

admission of delegates and had already decided this particular issue and now desired a general opinion.

THE SUBMISSION OF THE QUESTION

The request for an advisory opinion when it reached the Council was referred to a *rapporteur,* the Marquis Imperiali (Italy), who rendered a report to the Council on May 12th, in which he stated that the question, as submitted in *the last paragraph* of the communication of the Director of the International Labor Office had been selected for submission to the Court.[8] Lord Balfour pointed out that the procedure proposed was an obvious interference with the discretion exercised by the Government of a member state and that it was a serious thing to decide that such discretion had been improperly exercised. The Director of the Labor Office replied that the point raised by Lord Balfour presented no difficulty because Her Majesty's Government had no objection to the opinion of the Court being requested.[9] Lord Balfour accepted this assurance and the Council passed the following resolution:[10]

"The Council of the League of Nations, having considered the letter of March 17th, 1922, from the Director of the International Labour Office to the Secretary-General, by which the Council is informed of the unanimous desire of the third International Labour Conference and of the Governing Body of the International Labour Office that the Council will request the opinion of the Permanent Court of International Justice upon the question formulated in the latter, resolves;

"(1) to request the Permanent Court of International Justice, in conformity with Article 14 of the Covenant of the League of Nations, to give an advisory opinion upon the question 'whether the Workers' Delegate for the Netherlands at the Third Session of the International Labour Conference was nominated in accordance with the provisions of paragraph 3 of Article 389 of the Treaty of Versailles;'

"(2) to authorize the Secretary-General to present this request to the Court, together with the letter from the Director of the International Labour Office and the documents concerning the matter, to give all necessary assistance in the examination of the question and to arrange to be represented before the Court if necessary;

"(3) to request the International Labour Office to afford the Court all assistance which it may require in the consideration of the question hereby submitted."

The first intimation which the Netherlands Government received that it had been made a party to a suit, so to speak, was when the question had been notified by the Court to that Government. In a note

[8] *Official Journal,* June, 1922; pp. 610-612.
[9] *Ibid.,* p. 529.
[10] *Ibid.,* p. 529.

dated June 7th, 1922, sent to the Secretary-General by the Netherlands Minister at Berne, the Netherlands Government protested. The note stated that the Netherlands Government had learned with surprise of the action taken by the Council in that the Court had been requested to render an opinion upon an act of that Government without its assent; and that the Director of the International Labor Office had made an observation at the meeting of the Council to the effect that "the second difficulty of which Lord Balfour had spoken—that of interference in the affairs of the Netherlands Government—no longer existed, since this Government had agreed to the proposal of the Credentials Committee." He pointed out the error, stating that the resolution of the Third International Labor Conference had stated a general question on the interpretation of Article 389 of the Versailles Treaty and to the submission of this question the Netherlands Government had no objection. The note then said:[11]

"You will understand that the assent given to this resolution by the delegate of the Government of the Netherlands to the International Labor Conference does not imply in any manner that the Queen's Government consents to the resolution adopted by the Council, resolution upon which it has never been in a position to pronounce its opinion. The Netherlands Government deems it to be its duty to state clearly the preceding facts. It considers that the form adopted constitutes a dangerous precedent in the relations between the League of Nations and its members, and since Article 389 has given rise to incertitude in other instances also, the Queen's Government ventures to hope that the form of the question submitted will be put in accord with that adopted by the International Labor Conference. In case it should not be possible to comply with this request, the Netherlands Government expects that the Court shall be informed of the preceding facts." [12]

[11] *P. C. of I. J., Series C, No. 1;* p. 423. (In French.)

[12] Before the Court, M. Limburg, representing the Netherlands Government, in referring to this matter, said:

"The object and utility of par. 5 of Art. 4 of the Covenant of the League of Nations are thus brought home to us in a most convincing manner:

" 'Any Member of the League not represented on the Council shall be invited to send a representative to sit as a Member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.'

"I now come to the second and last point with which I wish to deal. No invitation to attend the Council meeting of May 12th was sent to the Netherlands Government. This omission to invite the Netherlands Government to attend the meeting of the Council on May 12th was an infringement of the provisions of paragraph 5 of Article 4 of the Covenant, but, what is a more serious matter, by this omission Her Majesty's Government was not given an opportunity of protesting against the latest version of the request, for the very simple reason that it was not brought to that Government's knowledge." *(P. C. of I. J., Series C, No. 1;* p. 101.)

In the absence of the Secretary-General, the Under-Secretary-General replied to this note on June 12th, 1922, stating that the Council was not in session but a copy of the note had been forwarded to the members; that the Council had adopted the phrasing of the question as presented by the Director of the Labor Office, because the Court in Article 72 of its Regulations implies that the question of law upon which the opinion of the Court is sought be phrased in precise and concrete terms. In closing, the note said:[13]

"I venture to state that the Council took all steps to avoid the creation of a dangerous precedent in the relationship between the League of Nations and its members. Since the request presenting the question to the Court was transmitted on May 22nd, 1922, it would be difficult to make a change in its form. Nevertheless I have forwarded your letter of June 7th together with my answer, to the Permanent Court of International Justice."

The members of the Council were, therefore, immediately informed and the Court did not take up the consideration of this question until June 22nd; but the question submitted to the Court remained unchanged. The Council members, though fully informed, made no correction and the Court did not exercise the discretion attributed to it by Justice Moore in granting an advisory opinion.[14] Therefore, the first question before the Court was submitted in violation of two fundamental rights: (1) The right contained in the Covenant, of a member state to be represented and to vote with the Council when a matter affecting the interests of that state is being discussed; and (2) the right of assent of a state before it is made a party in an actual dispute before the Court.[15]

THE OPINION OF THE COURT

Oral arguments were presented to the Court on behalf of the Netherlands and British Governments, the Trades Unions organizations, together with a statement by the Director of the International Labor Office. On July 31st, 1922, the Court rendered its opinion. It redeemed in a measure the injustice done to the Netherlands Government, as follows:[16]

[13] *P. C. of I. J., Series C, No. 1;* pp. 424-426.

[14] Chap. XXIV; p. 444.

[15] It is impossible to believe that, had these fundamental rights been denied to Great Britain or France, the Under-Secretary-General would have been permitted to justify the injustice or that the Court would have considered the question, except in accordance with the resolution passed by the General Conference. It is a conspicuous instance of discrimination against a small state, placed at a singular disadvantage because the Court was sitting in its State and the President of the Court was its national. It suffered the injustice rather than discredit the opening of the Court at The Hague.

[16] *P. C. of I. J., Series B, No. 1;* p. 17.

"Since the Netherlands Workers' Delegate to the Third Session of the International Labour Conference was admitted by the Conference, the Court is of opinion that the sole object of the question submitted to it is to obtain an interpretation of the provisions of paragraph 3 of Article 389. Though, according to the form given to the question by the Council of the League of Nations, the method of procedure adopted by the Government of the Netherlands for the nomination of the Workers' Delegate forms the subject of the question, this is solely in order to fix clearly the state of facts to which the interpretation has application."

On the interpretation of Article 389 of the Treaty, the Court held that the obligation is that persons nominated should be chosen in agreement with the organizations most representative of either employers or work people; that there was no definition of the word "representative" in the Treaty, but those were meant who best represented employers and workers respectively; and that "numbers are not the only test of the representative character of the organizations, but they are an important factor; and other things being equal, the most numerous will be the most representative." [17]

As to the question concerning organizations, in the plural, wherein it was alleged that the plural was used only because it was dealing with both employers and workers, and the meaning was that the Government, in naming a delegate from each, should proceed in agreement with the views of each, the Court did not accept this interpretation but held that "organizations" referred to both. The Court specifically stated:[18]

"If, therefore, in a particular country there exist several industrial organizations representing the working classes, the Government must take all of them into consideration when it is proceeding to the nomination of the workers' delegate and his technical advisers. Only by acting in this way can the Government succeed in choosing persons who, having regard to the particular circumstances, will be able to represent at the Conference the views of the working classes concerned."

For these reasons the final decision was as follows:[19]

"The Court is of opinion that the Workers' Delegate for the Netherlands at the third session of the International Labor Conference was nominated in accordance with the provisions of paragraph 3 of Article 389 of the

[17] *Ibid.*, p. 19.
[18] *Ibid.*, p. 23.
[19] *Ibid.*, p. 27.

Treaty of Versailles and therefore answers in the affirmative the question referred to it." [20]

The Court, having decided this question in favor of the Netherlands Government, did not raise the issue which Lord Balfour apprehended, namely, criticism of the improper exercise of discretion by the Netherlands Government. Its opinion awarded victory to the Catholic body of organized workers as against the Socialist body.

COMMENTARY

In this, the first question submitted for an advisory opinion, two facts stand out: (1) A small state, on protest against a manifest inaccuracy and public injustice, whereby it was made to appear as a possible violator of Article 389 of the Versailles Treaty, was refused a rectification by both the Council and the Court. Had this protest been made by a Great Power, the question to the Court would undoubtedly have been amended. (2) The question whether the plural or singular of the word "organizations" was applicable was an administrative affair fully covered by the Treaty and well within the jurisdiction of the General Conference, and it was hardly worthy of the first undertaking of a great court when about it were controversies and "ruptures" threatening the peace of Europe.

II

REGULATION OF CONDITIONS OF AGRICULTURAL LABOR

The question involved in this controversy was whether agricultural labor was to be included within the definition of Article 396 of the Treaty of Versailles, which reads as follows: [21]

"The functions of the International Labor Office shall include the collection and distribution of information on all subjects relating to the international adjustment of conditions of industrial life and labor, and particularly the examination of subjects which it is proposed to bring before

[20] Manley O. Hudson, legal adviser to the Washington Labor Conference, rendered an opinion in 1919 to the chairman of the Credentials Committee in response to a request for an interpretation of Art. 389, as follows:

"If this order be followed, it may appear that in a particular country the industrial organizations which exist are not to any considerable degree reasonably representative of employers or of work people. I venture the suggestion that in such cases the Member is not bound by this Article to choose delegates or advisers in agreement with existing organizations, but is free to choose delegates and advisers as it may see fit." *(P. C. of I. J., Series C, No. 1;* p. 147.)

[21] *P. C. of I. J., Series C, No. 1;* p. 178.

the Conference with a view to the conclusion of international conventions, and the conduct of such special investigations as may be ordered by the Conference."

The issue was raised by France in an effort to limit the powers of the International Labor Office. The question arose in the following manner. At its first session in Washington, in 1919, the General Labor Conference decided to include the subject of agricultural labor. In accordance with this decision, the agenda for the Conference of 1921 contained the following items: (1) The adaptation to agricultural labor of the Washington decisions concerning the regulation of hours of work; (2) adaptation of the decisions concerning measures for the prevention of, and providing against, unemployment; and the protection of women and children in agricultural work; and (3) special measures for the protection of agricultural workers, namely, technical education, living-in conditions of such workers, guarantee of rights of association and protection against accident, sickness, invalidity and old age.[22]

When this agenda was announced, these items, especially that relating to hours of labor, aroused opposition in France. This opposition was based on two main grounds. (1) The alleged incompetence of the International Labor Office to deal with these subjects. (2) That the principles of Article 427,[23] particularly relating to an eight-hour day, could not be applied to agriculture as it was a thing apart; that the question was essentially national and subject to the laws of nature; and being national it could not be subjected to international regulations; and being subject to laws of nature it could not be governed by uniform principles. (3) It was especially objected that these adaptations of the decisions of the Washington Conference could not be applied to small freehold farmers and tenant farmers who form in France a considerable proportion of the agricultural workers.

For these main reasons, and by reason of adverse discussions in the French Senate, the French Government on May 13th, 1921, requested the International Labor Office to withdraw the question of the eight-hour day but agreed to the retention of the other items. Certain organizations in France then began a campaign to influence public opinion and on October 7th, 1921, a second memorandum was forwarded stating that, in accordance with Article 402 of the Treaty

[22] *P. C. of I. J., Series B, Nos. 2 and 3;* p. 15.

[23] These included: (1) Labor is not a commodity; (2) right of association; (3) living wage; (4) eight-hour-day; (5) one day's rest in seven; (6) abolition of child labor; (7) equal pay for equal work.

of Versailles, France would object to the inclusion of the items.[24] On October 26th, the objection was raised in the General Conference then in session. On October 27th, 1921, the General Conference adopted a resolution (74 votes to 20) affirming its competence to discuss these matters. On October 28th, the question relating to hours of work was removed from the agenda, there not being the necessary two-thirds vote to retain it. A Committee was then appointed to consider the matter; and it was voted to put the question of hours of labor upon the agenda for the 1922 Conference; but to consider certain items concerning unemployment, protection of women and children, and a special measure for the protection of agricultural workers at the 1921 session.[25]

The persistent intention of the General Conference to discuss the question, alleged by the French Government to be beyond its competence, and continued agitation in the French Parliament, led that Government to instruct M. Hanotaux to submit on January 13th, 1922, the following resolution to the Council for its adoption:[26]

"The Council resolves, in accordance with Article 14 of the Covenant, to request the Permanent Court of International Justice to give an advisory opinion on the following question: 'Is the International Labor Office competent to deal with questions of agricultural labour?' If the reply is in the affirmative, how far do its powers extend in the matter?"

The Council deferred discussion until a subsequent meeting, recommending that the Secretary-General take all necessary measures to institute the suggested procedure, including consultation with the International Labor Office. At a meeting of the Council, held on May 12th, 1922, the question was again discussed. M. de Lapradelle, representing the French Government, and M. Thomas, Director of the International Labor Office, were invited to take part in the meeting of the Council. The question, as formulated by M. de Lapradelle and his associates, was as follows:[27]

"Did the competence of the International Labor Organization extend to regulating the labor conditions of persons employed in agricultural work?"

Thereupon, a discussion arose whether the Council, upon recommendation by one of its members to consider a dispute, need consult the Governing Body of the Labor Organization before submitting the

[24] Items so objected to are not excluded if a two-thirds majority of the Conference is in favor of considering them.

[25] *P. C. of I. J., Series C, Nos. 2 and 3;* pp. 17-19.

[26] *Official Journal,* February, 1922; p. 106.

[27] *Ibid.,* June, 1922; p. 527.

question to the Court. M. Thomas pointed out the desirability of consulting that body, stating that if the Council referred the question immediately to the Court, the possibility might arise that every time the General Conference took a decision, some government would feel authorized to question its competence; also that the Council might run the risk of appearing to be the first to give an opinion on the merits of the case. It was argued that, inasmuch as the International Labor Office represented both labor and governments, justice, courtesy and wisdom indicated that the Governing Body should first be consulted, especially in this instance, when the French Government had a representative on that Body to present its point of view.

But the Council considered such reference unnecessary and passed the following resolution requesting an advisory opinion on the question:[28]

"Does the competence of the International Labour Organization extend to the international regulation of the conditions of labour of persons employed in agriculture?" [29]

When the question came before the Court on July 3rd, 1922, oral statements in favor of the competence of the International Labor Office were made by a representative of Portugal; and against its competence by a representative of Hungary. The main defense, however, was conducted by M. Thomas, in which he pointed out, among other things, that the Allied Powers had, in correspondence with Hungary over the Trianon Treaty, established the fact that agricultural labor was included; and in which he refuted the statements made on behalf of the French position.[30]

In reaching an opinion, the Court held that the Treaty must be read as a whole and that its design was to establish a *permanent labor organization* which militated against the argument that agriculture should be excluded; that the Treaty was comprehensive in undertaking to impose *conditions of labor*. Also the Court held that the language concerning the General Conference was equally comprehensive in referring to *work people*. On the question of the eight-hour day, the Court stated:[31]

"But it is sufficient for the present question to say that this difficulty is fully recognized in the Treaty, and that, while no measure can be applied

[28] *Official Journal*, June, 1922; p. 528.

[29] The Director of the International Labor Office suggested a rephrasing of the question, which proposal was rejected.

[30] *P. C. of I. J., Series C, No. 1;* p. 258.

[31] *P. C. of I. J., Series B, Nos. 2 and 3;* p. 31.

in any country that does not see fit to adopt it, there is nothing in Article 427 that enjoins the application of all the principles in their entirety by any particular nation, or at any particular time, or to any particular kind of labor."

And finally, the Court stated that, in regard to the inclusion of agricultural labor, it was unable to find any real ambiguity and had no doubt that it was included. Therefore:[32]

"The Court is of opinion that the competence of the International Labor Organization does extend to international regulation of the conditions of labor of persons employed in agriculture, and therefore answers in the affirmative the question referred to it."

From this opinion rendered on August 12th, 1922, M. Weiss (France) and M. Negulesco (deputy judge, Roumania) dissented without stating their reasons.

COMMENTARY

The International Labor Organization was successful in defeating this first attempt to limit its powers, and the opinion rendered by the Court contained full justification for increased activities in the direction of agricultural labor. The only disturbing element was the manner in which the Council treated the Governing Body of the International Labor Office, in failing to observe those qualities of "justice, courtesy and wisdom" which the Marquis Imperiali urged it to adopt.[33] In submitting a question to the Court, vitally affecting the interests of labor, without laying the matter before the body in which labor had a voice, and without its approval of the *compromis*, the Council disregarded the labor representation within its organization.

III

METHODS OF AGRICULTURAL PRODUCTION

At the very time when the question of agricultural labor was being resolved by the Court, the French Government prepared another surprise for the International Labor Organization. On June 13th, 1922, it requested the Council to submit a supplemental question to the Court for an opinion, namely:[34]

"Does the examination of proposals for the organization and development of methods of agricultural production, and of other questions of a like character, fall within the competence of the International Labor Organization?"

[32] *P. C. of I. J., Series B, Nos. 2 and 3;* p. 43.
[33] *Official Journal,* June, 1922; p. 527.
[34] *Official Journal,* August, 1922; p. 893.

At the same time the Secretary-General was requested by the French Government to inform the Court of the proposed question and to ask whether the President of the Court:[35]

"Might not consider it appropriate to postpone provisionally examination of the first request [agricultural labor] in order that, if the Council should accept the supplementary request, examination might be made of the competence of the International Labor Organization in agricultural matters as a whole, a competence which it is the object of the present memorandum formally to dispute."

The basis for this dispute appears to have been a resolution introduced by M. Zumeta (Venezuela) in the General Labor Conference in 1921, as follows:[36]

"The Conference recommends that the members of the International Labor Organization take measures to institute a methodical system of inquiry and collection of information through the International Labor Office with a view to organizing and developing effectively agricultural production."

When this resolution was proposed, the discussion indicated that its purpose was to *consider unemployment in connection with agriculture,* with a view to devising a scientific system for utilizing the labor available in the various countries which would be favored by the development of the means of production. This resolution was referred to the Selection Committee of the General Conference, which proposed that it be referred to the Governing Body with the invitation that it be submitted, in the first place, to a Joint Agricultural Commission, to be charged with a further examination of the question and others of a similar nature.

The General Conference accepted the recommendation, following the Director's statement that it might be possible to secure on this Commission representatives from the International Institute of Agriculture at Rome. This brought the matter on the agenda of the Governing Body in January, 1922—the question being the consideration of the appointment of this joint commission to study agricultural questions, in collaboration with the above Institute. The Governing Body discussed this proposal on January 19th, 1922, and was then informed by the French representative that he had been instructed to notify that body of the action taken by the French Government on January 13th, to obtain an opinion upon the competence of the International Labor Office in agricultural matters, and advised the

[35] *Official Journal,* August, 1922; p. 893.
[36] *Ibid.,* p. 897.

Governing Body to adjourn consideration until the opinion of the Court had been given. He then proposed the following resolution:[37]

"The Governing Body decides to defer the constitution of the Advisory Commission charged with the examination of the resolution on agricultural production and questions of a similar nature until the attributes of the Permanent Labor Organization in agricultural matters be more strictly defined, especially by agreement with the International Institute of Agriculture at Rome."

This resolution was defeated and in its place the following was passed:[38]

"In accordance with the resolution passed by the International Labor Conference, the Governing Body decides in principle that it will proceed, at its next session, to setting up the Agricultural Commission, and asks the Director in the interval to examine the possibility of collaborating with the International Institute of Agriculture at Rome."

The Director thereupon opened negotiations with the above Institute which appointed three delegates. A conference was arranged with a view to determining the spheres of action of the two organizations. The French representative expressed the view that the proposed collaboration with the Institute met the difficulty, inasmuch as it would lessen the competence of the International Labor Organization in matters concerning agriculture, and he supported the proposal.[39]

The Commission thus created appears to have met and to have been in the process of defining the relative competence of the International Labor Office and the Institute, when the French Government made its request for a supplemental opinion to the Council on the ground that the Labor Organization "is really only competent to study and elaborate the regulation of labor conditions which, in the opinion of the French Government, means conditions of industrial labor."[40] The reasons advanced were similar to those set forth in the controversy over agricultural labor.

It will be observed that the French Government asked for a consideration of the whole question of competence in agricultural matters on the basis of a resolution before the General Conference, which recommended *that member states take action* to institute an inquiry: that this resolution was changed by the Governing Body into one establishing a commission of inquiry in collaboration with the Agricultural Institute of Rome; and that the only objective contemplated in the resolution was *the collection of information.*

[37] *Official Journal,* August, 1922; p. 900.
[38] *Ibid.,* p. 901.
[39] *Ibid.,* p. 901.
[40] *Ibid.,* p. 895.

THE QUESTION BEFORE THE COUNCIL

At its session held in London on July 18th, 1922, the Council considered this request for a supplemental opinion. M. Thomas, Director of the International Labor Office, was asked to come to the Council table. He stated that the Labor Office had never claimed competence in matters relating to agricultural production: that the question had been discussed with the Institute of Agriculture and a joint commission formed to examine it. The Director called attention to the fact that the French Government had not advised the Governing Body beforehand of its intention, in January, to request an advisory opinion. The explanation given for this omission at that time was that the Council meeting preceded that of the Governing Body and it had on its agenda "questions to be submitted to the Permanent Court of International Justice" and the French Government had thought it necessary to utilize the opportunity. The Director then stated:[41]

"It would seem desirable to state at once that the International Labour Organization has never considered any intervention of this nature, and to declare categorically from the beginning that in the opinion of the International Labour Office the organization and development of agricultural production are matters outside the competence of the International Labour Organization. * * *

"If, before formulating its demand for an opinion—a demand which tends to create and to lend authority to the unjustifiable idea that the Organization does, in fact, consider itself competent—the French Government had been good enough to submit the question to the Governing Body, there is no doubt that full agreement with the view of the French Government that the International Labour Organization was incompetent in this matter would have been expressed. The Government would thus have ascertained beyond doubt that the Organization did not claim any competence whatever in questions of production. At the most, in agricultural as in industrial questions, the Organization can only consider the effects of mutual reactions between the regulation of labour and production."

To this disclaimer by its Director that the Labor Office considered itself competent to deal with methods of agricultural production, M. Viviani (France) said that the Labor Office might very well change its views and might one day claim competence; therefore it would be preferable to refer the matter to the Court, a formal decision of which would remove all difficulties later on. The Director objected on the ground that "to refer the question to the Permanent Court would suggest that the International Labor Office had claimed a competence which, as a matter of fact, it had never claimed, and so might cause

[41] *Official Journal,* August, 1922; p. 897.

the office once more to be unjustly suspected of desiring to extend the range of its competence.[42] M. Viviani contended that if the French Government found itself in the position where it could not appeal to the Permanent Court by reason of opposition such as Director Thomas afforded, other governments might be discouraged from doing so in other cases.[43] There was an advantage in asking the Court for an opinion which would establish a jurisprudence to which states could refer. Thereupon the Council agreed to forward this supplemental question to the Court.

Thus, for the second time, the Council refused to adopt a policy of wisdom, courtesy and justice to the Governing Body of the International Labor Office, and referred to the Court *a question of research* on the theory that it might some time form the basis of a recommendation which France was at liberty to accept or reject. In effect, upon the plea of creating a precedent to help other states to obtain advisory opinions, the Court was to be asked for a moral injunction against a particular form of gathering knowledge.

THE QUESTION BEFORE THE COURT

When the question came before the Court, M. de Lapradelle (France) pointed out that the French Government *was threatened with a quite definite extension of the competence* of the Labor Organization and traced in detail the events hereinbefore described. M. Thomas repeated his disclaimer made before the Council and in addressing the Court, said:[44]

"What in truth constitutes competence in questions of agricultural production? In what direction could an international organization, having competence in questions of agricultural production, direct its activities? It could, for instance, consider the relative values of manures which may be used for different crops or in different countries. It could decide what system of rotation of crops, what methods of cultivation ought to be preferred. It could study also diseases of plants and animals and suggest remedies. * * * If, therefore, the questions which may arise as regards agricultural production are of this nature, how in the name of common sense can it be supposed that at any time or in any circumstances our

[42] *Official Journal,* August, 1922; p. 795.

[43] The precedent thus sought appears to have failed, Hungary being denied such an opinion in the instance of its optants in Roumania and Lithuania in its request for a review of the powers of the Council exercised in the Vilna controversy, Chap. XXXIII, pp. 613 and 624.

[44] *P. C. of I. J., Series C, No. 1;* p. 310. Those who desire to observe first-hand the manner in which the time and prestige of the Court was wasted on a trivial issue will be amply repaid by reading the full record of this dispute issued by the Court.

Organization, which is responsible for the regulation of labor conditions and has to establish international conventions governing labor conditions, can turn its attention to particular methods of cultivation, to the choice of the best manures or to the best system for the rotation of crops?"

It was charged by the Director that the French Government, having some doubts as to the soundness of its case with regard to the regulation of labor, had deliberately sought out another subject for an opinion upon which there could be no doubt of the result.[45] And in seeking the motive which lay behind this second request, he stated:[46]

"When you have stated, as you are bound to do, having regard to the form of the question submitted to you, that the International Labour Office has no competence in regard to agricultural production, tomorrow, perhaps, interests which may be affected by certain reforms, will cite the opinion of the Court in order to prevent the application of protective regulations."

The Court based its opinion upon the construction to be given to the Treaty provision, stating that the International Labor Office can adopt any measures calculated to benefit those engaged in industry, but this does not extend to the promotion of any improvements in the processes tending to increase the amount of production; that the organization and development of means of production are not committed to the Labor Organization. The Court then said:[47]

"It may be that in some cases the improvement of the conditions of the workers may increase the amount of the production. Such increase obviously may result from the development of vocational and technical education. It may be that the limitation of the hours of work and other provisions for the benefit of the workers may diminish or increase the amount of production.

"It does not follow that the International Labour Organization must totally exclude from its consideration the effect upon production of measures which it may seek to promote for the benefit of the workers. If it should appear that a particular measure would involve a material diminution of production, this might be a matter proper to be considered by the Organization before deciding on its adoption, although it might be desirable in other respects. So, for instance, protection against sickness, disease and injury arising out of employment may involve the consideration of methods and processes of production, such as the use of white phosphorus, and of white lead, both of which have been dealt with as subjects within the scope of international regulation as affecting the conditions of labour. But the consideration of methods of organizing and developing production from the economic point of view is in itself alien to the sphere of activity marked out for the International Labour Organization by Part XIII of the Treaty; and, broadly speaking, any effect which the performance by the Organiza-

[45] *P. C. of I. J., Series C, No. 1;* p. 310.
[46] *Ibid.,* p. 331.
[47] *P. C. of I. J., Series B, Nos. 2 and 3;* p. 57.

tion of its functions under the Treaty may have on production is only incidental.

The Court confined its opinion to the specific question, declining to include "other questions of a like character" as being indefinite;[48] and on August 12th, 1922, it pronounced the opinion that examination of proposals for the organization and development of methods of agricultural production was not within the competence of the International Labor Organization. Thus, on the same day, the International Labor Office received from the Court, approval to include agricultural labor within its competence, but an opinion prohibiting all inquiries whenever the methods of improving conditions of agriculture were involved.

COMMENTARY

These three disputes—how to select a delegate to a Labor Conference; whether agricultural labor is industrial; and whether research into agricultural production is within the competence of a body dealing with agricultural labor occupied the Court during the first year of its existence. These questions were so remote from the problems of peace and war with which at that time the world was struggling that they leave the impression of "much ado about nothing." They convey a sense of derogation of that great tribunal which was to bring security to war-weary people. Certainly, to international peace, the first year of the Court brought nothing; for its opinions concerned administrative squabbles within the League which any measurable degree of good will, high moral principle, and courtesy would have adjusted without recourse to law. There can be little doubt that these controversies have affected the prestige and scope of the work of the International Labor Office.[49]

[48] It will be recalled that the Under Secretary-General declined to change the form of the question concerning the Netherlands Delegate on the ground that the Regulations of the Court required that the question be precise and concrete, but that the Council, on request of France, was entirely willing to include a question so vague that the Court declined to deal with it.

[49] The writer, from personal knowledge, offers one illustration of the retrenchment of activities by the General Conference. An Immigration Conference met in 1921 under the auspices of the International Labor Organization and adopted an elaborate and far-reaching series of recommendations. These have not been acted upon, and at the session of the General Conference in 1922, the work of the Immigration Division was restricted to the gathering and dissemination of statistics. An international conference on immigration has just been concluded in Rome, over which Lord Ullswater, Chairman of the Immigration Conference held in Geneva in 1921, presided. The Commission which arranged the Rome Conference has been continued in office to map out plans for a further conference in 1927, the object being the establishment of an organization to take over some of the functions which the International Labor Office has been unable to exercise.

These three opinions present a contrast to the world of actuality. During 1922, the inhabitants of the Saar Basin alleged to the Council specific infringements of the Versailles Treaty; and from Danzig had come many cases on appeal, alleging infringements of the Treaty provisions. These, too, were administrative questions of a grave character, wholly within the competence of the Council to refer to the Court. But the Court was occupied with the administrative affairs of the Labor Organization while the grave issues of rights of liberty, property and free speech were not accorded a judicial opinion. In the contrast there is much to disquiet the outlook for a peace wherein scrupulous justice is held to be an element.

CHAPTER XXVIII

NATIONALITY DECREES IN TUNIS AND MOROCCO

Although France and Great Britain have had many differences of opinion over European questions, arising during the life of the Court, they elected to submit but one dispute to that tribunal, concerning the rights of British residents in Africa. Although the legal responsibilities assumed by the two countries under the Versailles Treaty are ever in dispute, they brought to the Court only a matter arising from treaties executed before the war.

RIGHTS OF GREAT BRITAIN IN TUNIS AND MOROCCO

This dispute arose from nationality decrees issued under the direction of the French Government in these two countries, which decrees Great Britain alleged infringed upon its rights, guaranteed under Treaties with France.[1] These rights included the following:

Tunis is a sovereign independent state under a Bey and, by a Treaty of May 12th, 1881, was placed under the protection of France.[2] The reason given for this action was to prevent the disorders arising on the frontiers of the two states and along the coast of Tunis. Under this Treaty, the French Republic guaranteed the execution of existing treaties between Tunis and European powers. One of these treaties was an agreement of 1875 between Great Britain and the Bey of Tunis [3] whereby capitulatory rights of jurisdiction over British subjects in Tunis were conferred upon Great Britain. These rights included freedom of travel; that the British authorities should be the sole judges or arbiters whenever there were any criminal cases or complaints where the prosecutor and prisoner were British subjects, and in civil disputes among British subjects exclusively; also, that all civil differences between British subjects and the subjects of any foreign country other than Great Britain were to be decided wholly in the tribunal of foreign consuls without interference from Tunisian courts or Government; and that disputes of a civil and criminal nature between a British subject and a Tunisian subject were to be settled by the Bey or his delegate

[1] The decrees were identical and it is sufficient for this narrative to refer only to Tunis.

[2] *P. C. of I. J., Series C, No. 2,* Additional Volume; p. 70.

[3] *Ibid.,* p. 72.

in the presence of, and with the concurrence of, the British consul general or consul.

No revision of these rights had taken place between Great Britain and Tunis; but when France acquired the Protectorate, negotiations were opened between Great Britain and France with regard to a proposal by the latter that the former should abandon its extra-territorial jurisdiction over British subjects in Tunis. In a note from Lord Granville dated June 20th, 1880, the British Government agreed "to waive the rights of this country under the capitulations and Treaties to the extent which may be required to give full scope to the exercise of civil and criminal jurisdiction over British subjects by the new French tribunal."[4] The British Government, however, made this reservation:[5]

> "They do not, however, believe that it would be expedient to extend the change beyond what is required by the circumstances of the case, and they lay much stress, for instance, on the maintenance of those privileges and immunities which are enjoyed by consular officers in the East, and which partake of the character of those accorded to diplomatic agents in Europe."

British Consular jurisdiction in Tunis ceased to be in force, in accordance with the above note on January 1st, 1884. It will be observed that Great Britain did not abandon its complete capitulatory rights; but only those coming within the jurisdiction of French tribunals. Furthermore, on September 18th, 1897, a convention was entered into between Great Britain and France, providing that the treaties and conventions of every kind in force between the two countries should be extended to Tunis; and that the British Government should abstain from claiming for its consuls, subjects, and establishments any other rights in Tunis than those obtaining in France.[6] Also, on March 8th, 1919, and on May 23rd, 1919, notes exchanged between the two countries stipulated that the French Government undertook not to accord to the subjects, protected persons, or merchandise of a third power any treatment which would not be effectively applicable to those of the British Empire.[7]

Great Britain, therefore, contended with regard to the rights of British subjects, that the convention between Great Britain and the Bey of Tunis of 1875 had not been modified by the Order in Council of 1883; by the Anglo-French Convention of 1897; nor by the notes of 1919; and that France was bound to accord to British subjects in Tunis a treatment not less favorable than that accorded to Italian

[4] *P. C. of I. J., Series C, No. 2,* Additional Volume; p. 41. [5] *Ibid.*
[6] *Ibid.,* p. 44. [7] *P. C. of I. J., Series C, No. 2,* Additional Volume; p. 44.

subjects in Tunis. On the other hand, the French maintained that the Anglo-French Convention of 1897 and the terms of the notes of 1919 were applicable exclusively to commercial matters.

THE NATIONALITY DECREES

This was the situation when, on November 8th, 1921, the native officials of Tunis and Morocco, acting under French advice, issued decrees affecting the nationality of persons born in Tunis and Morocco. These acts were followed immediately by a similar decree issued by the President of the French Republic, of which Article 1 reads, in part, as follows:[8]

"Article 1. Every person born in the Regency of Tunis of parents of whom one, justiciable as a foreigner in the French courts of the Protectorate, was himself born in the Regency is a Frenchman, provided that his filiation has been established before the age of twenty-one years, in conformity with the provisions of the national law of the country of his father or mother or of French law.

"If this parent is not the one who, by virtue of the regulations imposed by French law, gives the child its nationality, the latter can, between his twenty-first and twenty-second year, declare that he renounces French nationality."

The British Government protested immediately against these decrees and not receiving the necessary assurances, proposed that France submit the matter to arbitration under the Arbitration Convention of 1903 between the two countries, which provided as follows:[9]

"Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of July 29th, 1899, provided, nevertheless, that they do not affect the vital interests, the independence or the honor, of the two contracting States, and do not concern the interests of third parties."

France, however, refused to submit the matter to arbitration and after negotiations extending over several months, the British Government had recourse to the League of Nations under Article 13 of the Covenant. This act led to a discussion between the two countries whether the dispute was suitable for submission to arbitration either under the arbitration convention of 1903 or under Article 13 of the Covenant. Great Britain, however, chose to rely upon the Covenant instead of upon the Hague Permanent Court of Arbitration, as the

[8] *P. C. of I. J., Series C, No. 2;* p. 256.
[9] *Ibid.,* p. 18.

Arbitration Convention specified, and on August 11th, 1922, set forth the situation in a communication to the League of Nations, as follows:[10]

"On November 8th, 1921, the French Government published in Tunis and Morocco (French zone), under the sovereignty of the Bey of Tunis and the Sultan of Morocco, respectively, certain Nationality Decrees, the text of which is annexed. The effect of these decrees is, shortly, to confer French nationality on persons born in those countries of parents also born there and justiciable before French tribunals. In virtue of these decrees, the French Government claim to impose the obligations of French nationality upon British subjects in Tunis and Morocco (French zone), in such manner as to override their status as British subjects and render them liable to French military service. In Tunis British subjects have been visited by the French military police, handcuffed, and forcibly taken to the French barracks, in order to compel their acceptance of these obligations.

"His Majesty's Government have entered repeated protests against these proceedings. They pointed out that the persons affected are British subjects in English law. They represented to the French Government that they were unable to admit that that Government could impose French nationality and its obligations on British subjects in virtue of their birth in a country which is not French territory, but is only under French protection. His Majesty's Ambassador at Paris not only contested the legality of these which, in the view of His Majesty's Government, entitled them to claim proceedings in international law but pointed to rights guaranteed by treaty for British subjects in Tunis the same rights as are accorded to the subjects of all other Powers. To these representations the French Government replied that they, in conjunction with the territorial sovereigns of Tunis and Morocco, possess sovereign rights which justify the imposition of French nationality on persons born in those countries and the proceedings taken to enforce this claim; and to the claim of His Majesty's Government that existing treaty provisions guarantee to British subjects the same treatment as is accorded to the subjects of other Powers in Tunis, the French Government replied by a simple denial that any such treaty provisions are applicable to the present case."

In this memorandum, Great Britain stated that the dispute was one of a legal nature and should be submitted to arbitration under the Arbitration Agreement of 1903, and under Article 13 of the Covenant, as being a question of an interpretation of a Treaty and a question of international law. The French Government, however, refused to submit the question to arbitration on the ground that it was a matter solely within the domestic jurisdiction of France. This contention transferred the issue to Article 15 of the Covenant, under which France was willing to have determined the question of the competence of the League, thus deferring action under Article 13.[11]

[10] *P. C. of I. J., Series C, No. 2;* p. 254.
[11] Annex I; Vol. I, for text of Articles 13 and 15.

The question then arose as to what body should decide this new question. Under the Covenant, the Council is the body designated to take the decision but since that body must take its decisions by unanimous vote, agreement between France and Great Britain was no more likely than it had been in diplomatic negotiations. But the Court may take its decisions by a majority vote and the two states, therefore, agreed that the matter should be determined by the Court. The Council was therefore authorized by them to request an advisory opinion; such action being taken on October 4th, 1922, by the adoption of the following resolution:[12]

"(a) The Council decides to refer to the Permanent Court of International Justice for its opinion the question whether the dispute referred to above is or is not, by international law, solely a matter of domestic jurisdiction (Article 15, par. 8, of the Covenant);

"(b) The date of the meeting of the Court will be agreed between the two Governments;

"(c) Furthermore, the Council takes note that the two Governments have agreed that if the opinion of the Court upon the above question is that it is not solely a matter of domestic jurisdiction, the whole dispute will be referred to arbitration or to judicial settlement under conditions to be agreed between the Governments;

"(d) The Secretary-General of the League will communicate paragraphs (a) and (b) to the Court."

This resolution possesses several points of interest: (1) The Council *referred* the matter to the Court for its opinion. (2) It requested the two Governments to present the matter and to open negotiations with the Court. (3) It records the fact that the parties have agreed to submit the matter to arbitration or judicial decision in the event that the question is held to be international, but this fact was not to be officially communicated to the Court.

It will be observed that this procedure was the opposite of the autocratic method followed with regard to the Netherlands and with the International Labor Organization. In this instance, the Council consented to abrogate its own rights to decide the question under paragraph 8 of Article 15, and to become the channel through which the two Allied Powers obtained an advisory opinion. All details and communications with the Court were conducted by the two states which submitted their own documents and other evidence in the case. This contrast between the procedure in the Council when a small state is

[12] *Official Journal*, November, 1922; p. 1207.

involved or when an organization has incurred the displeasure of an Allied Power and that accorded to Allied Powers is not without significance.

THE ISSUE BEFORE THE COURT

In accordance with the foregoing resolution, the only question submitted to the Court was whether the matter was domestic or international. The parties agreed that an immediate opinion upon this question was necessary and requested that the Court meet in extraordinary session which was arranged for January 8th, 1923.[13] The British Government was represented by Mr. George Mounsey as agent, by Sir Douglass Hogg, British Attorney General, and Sir Ernest Pollock as counsel; while the French Government was represented by M. Merrillon as agent and by M. de Lapradelle as counsel.

In order to arrive at an opinion concerning the specific question submitted to the Court, it was necessary to argue the case in full although the Court was estopped by the form of the question submitted from rendering any opinion on the merits of the controversy. The questions raised by Great Britain were the following:[14]

"1. Are the persons affected by the Tunis and Morocco Decrees who claim and are claimed by His Majesty's Government to be British subjects rightly to be deemed British subjects?

"2. Is it competent for France, according to international law, to impose, without the consent of Great Britain, French nationality and the obligations resulting therefrom, including military service, on British subjects in Tunis and Morocco, being States not under her sovereignty, but under her protection, so as to override their existing nationality?

"3. Is it in accordance with international comity for France to impose French nationality on British subjects without giving to the individuals affected for the first time the opportunity of opting against such nationality?

"4. Did the Note of 1883 constitute an abandonment of His Majesty's extra-territorial rights of jurisdiction in Tunis?

"5. Does the Anglo-French Convention of 1897 entitle France to impose French nationality on British subjects in Tunis as if Tunis were France?

"6. If so, are the terms upon which French nationality is imposed by the Tunis decree, in fact, the same as those provided by the French Nationality Laws, having regard to the successive stages of those laws?

[13] It is not without interest to note that in this instance the Court was convened in extraordinary session within three months from the date of the resolution: whereas the excuse given for not referring the legal questions arising from the opinion of the Court in the case of the German settlers in Poland back to the Court but submitting them instead to arbitration is alleged to be delay through the Court. *(L. of N. Monthly Summary,* April, 1924, p. 62.) Can it be that settlers under Minority Treaties are less in need of court protection than are British subjects under Anglo-French Treaties?

[14] *P. C. of I. J., Series C, No. 2;* p. 35.

"7. Do the terms introduced into the Anglo-French Convention of 1897 by the Notes of 1919 enable His Majesty's Government to claim treatment for British subjects in Tunis equal to that accorded to Italian subjects by the Convention of 1896, or are such terms confined exclusively to commercial matters?"

It will be observed that Great Britain rested its case upon documents tending to prove the international character of the controversy; while the French conclusions were as follows:[15]

"(1) That Great Britain is not competent to make complaint against the legislative act of a sovereign state, such action only being permissible in claims raised in the particular case of an interested national.

"(2) That the right of legislating the nationality of persons within the limits of the jurisdiction of a state depends exclusively upon the sovereignty of that state, and, consequently, is not within the competence of the League of Nations.

"(3) That in no case may a state in arraigning another state before the Council of the League of Nations obstruct in the name of *jus sanguinis* the legislation, *jure soli* of the state under whose authority the interested persons belong.[16]

"(4) That this double rule and, consequently, this double exception, is equally applicable in protectorate countries, to individuals naturalized by the state of the territory and claimed by the protecting state.

"(5) That no particular treaty permits Great Britain to escape the application of general principles of law, neither in Tunis under the French-Italian Convention of September 28th, 1896, nor in Morocco, by any extra-territoriality maintained by Great Britain against all laws and equity.

"That consequently the Council of the League of Nations is incompetent to decide upon the dispute, on the subject of which it has asked the opinion of the Permanent Court of International Justice."

These important questions raised by Great Britain and France before the Court were to be taken into consideration by the Court in framing its opinion but it could give no opinion concerning the merits of the case. This restriction, however, seems to have been justified in view of the agreement between the two states to submit subsequently the question of the merits of the dispute either to arbitration or to judicial decision, wherein they were to be examined.

THE OPINION OF THE COURT

These divergences of opinion between France and Great Britain, on the basis of the agreements, treaties and notes, as set forth before the

[15] *P. C. of I. J., Series C, No. 2;* Additional Volume; p. 32. (In French.)

[16] Those interested in the theories of *jus soli* and *jus sanguinis* as applied to principles of nationality will find an interesting discussion on this subject by M. de Lapradelle upon which question, however, the Court could not advance an opinion. *(P. C. of I. J., Series C, No. 2;* p. 80 ff.)

Court, required interpretation; and the Court held on February 7th, 1923, that this being the case, the subject was no longer of domestic concern only; and the exception in paragraph 8 of Article 15 of the Covenant did not apply. On this point the Court said:[17]

"The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

"For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states. In such a case, jurisdiction which, in principle belongs solely to the state, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as regards those states which are entitled to invoke such rules, and the dispute as to the question whether a state has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph. To hold that a state has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that state has a right to adopt such measures."

The Court therefore held:[18]

"That the dispute referred to in the resolution of the Council of the League of Nations of October 4th, 1922, is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant), and therefore replies to the question submitted to it in the negative."

From the point of view of law, Mr. Charles Noble Gregory makes the following observations upon this opinion:[19]

"The large conclusion as to the future course of this very high tribunal, which is suggested with much force is that it will evolve such juristic rules and conceptions as it sees fit, controlled by no code and but little if at all limited by judicial precedent or scholastic opinion. If it is called to deal with such international questions as may be discerned in the offing, even by our somewhat short-sighted and optimistic statesmen, it is apparent that it will probably register in perfect good faith and with supreme confidence, exclusively the views and policies of Europe. What those views and policies will prove to be as to the rights of Indian, Japanese and Chinese nationals on our shores, in our schools, in our lands, and in a claim, always appealing, for equal treatment, who can say? In the matter of enemy's property and the vast sums claimed in relation thereto, in the matter of international debts which are owed to us in billions by the

[17] *P. C. of I. J., Series B, No. 4;* p. 24.
[18] *Ibid.*, p. 32.
[19] *Am. J. Int. Law,* April, 1923; pp. 298-307.

countries to which these judges belong, who can foresee their conclusions or anticipate their decisions?

"If they are hostile to the interests of this country and contrary to those views of justice and equity which we have so long assimilated, how can they be reviewed or corrected? No means is apparent and even an advisory opinion will operate as compulsive."

JURISDICTION OF THE COURT AND COUNCIL

It will be recalled that the resolution, submitting the matter to the Court, contained a paragraph to the effect that if the opinion of the Court held the question to be international, the two countries agreed that they would refer the question either to arbitration or to judicial settlement. The British Government, in its argument, raised a number of questions concerning which a legal opinion would have been advantageous to the cause of peace and security. The French Government, in its argument, raised some important questions concerning nationality and naturalization of moment to the United States. When the Court rendered its opinion, France immediately offered to submit the case on its merits to the Court, the agent for the French Government making the following declaration:[20]

"Considering that the opinion of the Permanent Court of International Justice pronounced this day renders applicable sub-section (c) of the decision of the Council of the League of Nations, according to which the English and French Governments will conclude an agreement to submit the whole dispute to arbitration or to judicial settlement.

"Considering that it is desirable that this agreement should be concluded as soon as possible and that the French Government has already made known its wishes on this point on several occasions during the discussion; and that it is therefore justified in taking this opportunity to request the assent of the British Government by means of a declaration in Court.

"For these reasons

"May it please the Court to place on record that the French Government proposes to the English Government that the case should be submitted on its merits to the Permanent Court of International Justice."

The agent for the British Government, however, did not acquiesce, but made the following declaration:[21]

"Although I am not authorized to make a definite reply to the final conclusions of the French Government resulting from the opinion which has just been delivered by the Court, I feel sure His Majesty's Government will give careful consideration to any proposals which the French Government may see fit to address to them for the submission of the whole matter in dispute to the decision of the Permanent Court of International Justice,

[20] *P. C. of I. J., Series C, No. 2;* p. 13.
[21] *Ibid.*

to whom I wish to extend my thanks in the name of His Majesty's Government, for the careful and prompt manner in which the Court has answered the question placed before it."

On May 24th, 1923, without submitting the question further to the Council or to the Court, the two parties reached an amicable arrangement between themselves, the terms of which include:[22]

"(a) The French Government agreed to make arrangements before January 1, 1924, whereby a British national who is the child born in Tunis of a British national, who was himself born there, shall be entitled to decline French nationality, it being understood, however, that this right will not extend to succeeding generations.

"(b) A child born in Tunis of a British national born elsewhere than in Tunis is not claimed to possess French nationality, and French nationality will not be imposed on any British national born in Tunis before November 8, 1921, without an opportunity being afforded to him to decline it.

"(c) No attempt will be made to impose Tunisian nationality instead of French nationality on British nationals in Tunis.

"(d) Neither government abandons its point of view maintained either in the diplomatic correspondence or in the preliminary proceedings at The Hague; nor will the principle adopted in the present agreement be applicable elsewhere than in Tunis.

"(e) The application to British subjects of the similar nationality decrees promulgated in Morocco (French zone) will not for the present give rise to further proceedings at The Hague, since this question has at present no practical importance. On this question, the two governments reserve their rights."

This case offers the first instance where a dispute between member states was involved and in this class constitutes the only example wherein the Council did not apply the opinion granted at its request, but where the parties disposed of the opinion.

COMMENTARY

Within the limits prescribed for it, the Court appears to have performed its duty with due dispatch and observance of law, the French national, Judge Weiss, concurring in an opinion adverse to France. The Council appears also, with due diligence, to have referred the question to the Court on behalf of the parties who appeared, after the interim of nearly a year of diplomatic negotiation, to be in haste. But a number of questions were raised and disposed of which are not without interest. They include the following:

Can the matter of Nationality form the subject of a dispute before the League? The Court held that it may, when it said: "The mere

[22] *Am. J. Int. Law,* January, 1924; p. 6.

fact that a state brings a dispute before the League of Nations does not suffice to give this dispute an international character, calculated to exempt it from the application of paragraph 8 of Article 15. It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable." [23] In other words, it is a question for the Council to determine and not for the states to settle. There is no appeal whenever the Council decides the question either way.

"Can the Council make to a state a recommendation with regard to a modification introduced within the sphere of its public authority, by the exercise of its legislative, judicial and, finally, executive jurisdiction, in regard to a question of nationality? Further were the League of Nations to take such action, would it not be infringing upon the sovereign rights of states, and precisely those sovereign rights which states in signing the Covenant intended expressly to reserve to themselves? [24] The Court was of the opinion that when such questions were made the subject of treaty negotiations, that in itself indicated their international character and they would not be exempt under paragraph 8.

Will the Court be bound by the precise question submitted to it or will it exercise discretion, France requested an opinion upon the merits of the case on the ground that it was of the "highest importance in the interests of all nations which are, or may be, in possession of a Protectorate, or even one of the new Mandates of the League of Nations, which closely resemble protectorates, that a complete code of rules, or at least that a general principle applicable to the various protectorates, which may, moreover, present some variations in detail, should be laid down by means of the authoritative opinion of the Court of Justice." [25] On this point the Court held that it would be bound by the precise question even though it examined fully the merits of the case in order to answer the precise question submitted. The Court said:[26]

"If, in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds (*titres*) invoked by the Parties in this respect, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes.

"For the foregoing reasons, the Court holds, contrary to the final conclusions of the French Government, that it is only called upon to consider

[23] *P. C. of I. J., Series B, No. 4;* p. 25.
[24] *P. C. of I. J., Series C, No. 2;* p. 71.
[25] *Ibid.,* p. 242.
[26] *P. C. of I. J., Series B, No. 4;* p. 26.

the arguments and legal grounds (*titres*) advanced by the interested Governments in so far as is necessary in order to form an opinion upon the nature of the dispute while it is obvious that these legal grounds (*titres*) and arguments cannot extend either the terms of the request submitted to the Court by the Council or the competence conferred upon the Court by the Council's resolution, it is equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to in the said resolution—with regard to which the Court's opinion has been requested."

What was the nature of the proceeding before the Permanent Court? On this point M. de Lapradelle, in addressing the Court, said: [27]

"In reality this procedure for furnishing advisory opinions to the Council is—and if one goes to the root of the matter this statement applies with its full force today for the first time—fundamentally a procedure by arbitration. * * * But, though, on the face of it, we are here simply to give you information to reply to the Council's request for an opinion, we have before us * * * what, in reality, amounts to an arbitration."

Was the Permanent Court of Arbitration mentioned in the Treaty of 1903, superseded by the Covenant and the Permanent Court of International Justice?

There seems to be no doubt that it was; for relief was sought under the Covenant and in the Court of Justice and not in the Court of Arbitration, as was provided under the Treaty of 1903.

[27] *P. C. of I. J., Series C, No. 2;* p. 52.

CHAPTER XXIX

AUTONOMY IN EASTERN CARELIA

This dispute concerned a people strange to most of the world, and involved the Council in an altercation with its most powerful European non-member state. The controversy concerned Finland, a member state which had desired to annex Eastern Carelia, and Russia which opposed any change in the status of the Eastern Carelians.

THE EASTERN CARELIANS

Carelia was originally the southeastern part of Finland, and led a troubled existence, being repeatedly invaded by both Russia and Sweden. In 1323, by the Treaty of Noteborg, it was divided between the two countries; and in 1621, by the Treaty of Nystadt, the northern and eastern districts were annexed to Russia. When Russia annexed Finland in 1809 the whole of Eastern Carelia came under Russian rule. The territory lies between the eastern boundary of Finland and the White Sea and Lake Onega; it extends to the Kola Peninsula on the north and to the River Svir on the south. It contains about 140,000 square kilometers, of which one half belongs to the Government of Archangel and the other half to the Government of Olonetz. Both of these districts are included under "Eastern Carelia." The population numbers about 200,000 people.

The people of this district, in common with many other slumbering nationalities, were awakened by the events of the war to dreams of self-determination and power. They desired to be free from Russian domination. Early in 1917, the inhabitants sent a petition to Russia, requesting that their national existence be respected. At a meeting of an assembly, representing the population of the territory, a demand was made for self government within prescribed territorial limits. Russia was then requested to restore the lands and property which had been seized by its armies; but these requests were ignored. In 1918, an effort was made to unite Eastern Carelia to Finland and a small Finnish expeditionary force was sent into the territory, but it was soon compelled by the Russian troops to withdraw. In 1919, meetings were held to proclaim Eastern Carelia an independent state which should be free to unite with Finland or Russia. About the same time a National Committee of Five was appointed to request recognition from the

Peace Conference. This National Committee was authorized to convene an assembly and to provide for elections and for a form of government. This undertaking was followed by an uprising against the Russian troops, then stationed in this territory. After severe fighting, the Russian Government regained control, but one of the districts in which British troops had been stationed during the war, namely Carelia-in-Viena, remained in control of the Carelians and became the active center of the movement for independence. A Diet, held in this district, voted in favor of independence and approved of a plebiscite to be held later, to determine whether Eastern Carelia should remain independent or be united to Finland. It appears, during this time, that the Eastern Carelians appealed to the Finnish Government from which they received very material assistance in their struggle for freedom or for union with that country.

THE TREATY OF DORPAT

Peace negotiations were then opened between Finland and Russia. The result was the Treaty of Dorpat, signed on October 14th, 1920, which specified the conditions upon which war between the two countries should terminate. Articles 10 and 11 constitute the basis for the Eastern Carelian dispute. Article 10 provided that Finland should within forty-eight hours after the Treaty had come into force, withdraw its troops from the communes of Repola and Porajärvi which were to be reincorporated in the autonomous territory of Eastern Carelia, which was to enjoy the national right of self-determination. Article 11 contained the following provisions for the benefit of the local population:[1]

"1. The inhabitants of the Communes shall be accorded a complete amnesty, as provided in Article 35 of the present Treaty.

"2. The local maintenance of order in the territory of the Communes shall be undertaken by a militia organized by the local population for a period of two years, dating from the entry into force of the present Treaty.

"3. The inhabitants of these Communes shall be assured of the enjoyment of all their movable property situated in the territory of the Communes, also of the right to dispose and make unrestricted use of the fields which belong to or are cultivated by them and of all other immovable property in their possession, within the limits of the legislation in force in the autonomous territory of Eastern Carelia.

"4. All the inhabitants of these Communes shall be free, if they so desire, to leave Russia within a period of one month from the date upon which this Treaty comes into force. Those persons who leave Russia under these conditions shall be entitled to take with them all their personal possessions and shall retain, within the limits of the existing laws in the independent

[1] *P. C. of I. J., Series B, No. 3;* Vol. II; p. 12.

territory of Eastern Carelia, all their rights to any immovable property which they may leave in the territory of these Communes.

"5. Citizens of Finland and Finnish commercial and industrial associations shall be permitted, for the duration of one year from the date upon which this Treaty comes into force, to complete in these Communes the felling of forests to which they are entitled by contracts signed prior to June 1st, 1920, and to take away the wood felled."

At the time this Treaty was signed, the Russian delegation made a Declaration which the Finnish Government claimed was part of the Treaty. The Russian Government denied this claim, insisting that it was merely a description of the situation and was intended only for purposes of information. This Declaration formed part of the dispute and was as follows:[2]

"The Socialist Federal Republic of the Russian Soviets guarantees the following rights to the Carelian population of the governments of Archangel and Olonetz (Aunus):

"(1) The Carelian population of the Governments of Archangel and Olonetz (Aunus) shall enjoy the right of self-determination.

"(2) That part of Eastern Carelia, which is inhabited by the said population, shall constitute, so far as its internal affairs are concerned, an autonomous territory united to Russia on a federal basis.

"(3) The affairs of this district shall be dealt with by national representatives elected by the local population, and having the right to levy taxes for the needs of the territory, to issue edicts and regulations with regard to local needs, and to regulate internal administration.

"(4) The local native language shall be used in matters of administration, legislation and public education.

"(5) The autonomous territory of Eastern Carelia shall have the right to regulate its economic life in accordance with its local needs, and in accordance with the general economic organization of the Republic.

"(6) In connection with the reorganization of the Military defensive forces of the Russian Republic, there shall be organized in the autonomous territory of Eastern Carelia a militia system, having as its object the suppression of the permanent army and the creation in its place of a national militia for local defence."

FINLAND APPEALS TO THE LEAGUE

On November 26th, 1921, the Finnish Government complained to the League of Nations that the rights granted to the Eastern Carelians under the Treaty and Declaration had not been put into operation; but on the contrary it alleged that the people had been heavily taxed and there was an uprising against the Soviet Government. The complaint stated that, owing to conditions in the territory, Finland was receiving many refugees for whom it must provide; and it pointed out

[2] *P. C. of I. J., Series B, No. 3,* Vol. II; p. 26.

that these people constituted a minority in need of protection.[3] The Finnish Government, therefore, requested the Council to appoint a Commission to make an inquiry on the spot in order to furnish a report for an impartial view to be formed by the Council on which to base a decision.[4]

On December 28th, 1921, the League received a communication from the "Central Government of Carelia" which set forth the conditions of the people of the country, with reference to oppression by Russia, and urged that they be permitted to carry out a plebiscite in order to achieve self-determination and self-government. The note alleged that instead of being granted the rights set forth in the Treaty and Declaration of Dorpat, the Soviet Government had established a "Commune of Carelian Workmen." The Carelians had then appealed to the Finns and Esthonians to come to their rescue and, finally, to the League of Nations.[5]

At the Council meeting held on January 13th, 1922, representatives of Finland, Esthonia, Latvia and Poland appeared on behalf of Eastern Carelia. The representative for Finland described the territory and condition of the inhabitants, and gave an account of their struggle for freedom, up to the time of the signing of the Treaty of Dorpat. The following violations of that Treaty and Declaration were alleged: (1) Autonomy had not been granted to the people; instead a Workers' Commune had been established; and in place of assemblies elected by the people, Soviet Councils were held. (2) The people who had fled from the country had not received the full amnesty promised to them; on the contrary, many were arrested on their return, and some had disappeared. (3) Assistance to the destitute who had returned had not been furnished; on the contrary their landed property had been distributed among the Russians. (4) In certain districts where the population had set up local militia it had been disarmed and a "Red" militia established. (5) Movable property had been confiscated. (6) Emigration had been prohibited. Finland therefore requested intervention by the League; (a) under Article 4 which authorizes the Council to deal with any matter within its sphere of action, affecting the peace of the world; and (b) under Article 17 which authorizes the Council to invite non-member states to accept its jurisdiction and to take measures and make recommendations to prevent hostilities. (c)

[3] Compare with Finland's attitude on the Aaland Islands where it opposed action by the League on behalf of the Aalanders. (Chap. XIII; p. 284.)

[4] *Official Journal,* February, 1922; pp. 165-169.

[5] *P. C. of I. J., Series B, No. 3,* Vol. II; p. 34.

Under Article 11, paragraph 2, wherein is declared that a matter threatening to disturb international peace may be brought to the attention of the Council by a member state.[6]

The representative of Esthonia expressed the desire of his Government to work for international peace but did not feel called upon to express any opinion on the merits of the controversy; and stated that it was the duty of the Esthonian Government to support Finland's request before the Council. The Lithuanian Government also associated itself with Finland's appeal, requesting the League to use its prestige to find a peaceful settlement. The representative of the Polish Government informed the League that it had offered its good offices to end the dispute but had been unsuccessful. It stated that it would continue its efforts and, in the meantime, would maintain an attitude of the greatest reserve. Latvia also added the weight of its opinion in favor of intervention by the Council.[7] Thus importuned by Finland, and reinforced by the support of the Baltic States and Poland, the Council, on January 14th, 1922, adopted the following resolution:[8]

"The Council of the League of Nations, having heard the statement submitted by the Finnish delegation on the situation in Eastern Carelia, contained in a letter from the Finnish Government, dated November 26th, 1921, and the statement submitted by the Esthonian, Latvian, Polish and Lithuanian representatives, is willing to consider the question with a view to arriving at a satisfactory solution if the two parties concerned agree. The Council is of opinion that one of the interested States Members of the League, which is in diplomatic relations with the Government of Moscow, might ascertain that Government's intentions in that respect.

"The Council could not but feel satisfaction if one of these States could lend its good offices as between the two parties, in order to assist in the solution of this question, in accordance with the high ideals of conciliation and humanity which animate the League of Nations.

"The Secretary-General is instructed to obtain all necessary information for the Council."

The terms of this Resolution are of interest in two respects. The Council did not follow the procedure laid down in Article 17 and invite the Soviet Government to accept the obligations of the Covenant as appears to be mandatory under such circumstances. It will be recalled that the complaint of Finland referred to the Eastern Carelians as minorities; but it does not appear throughout this controversy that any of the regulations concerning the procedure to be followed in dealing

[6] *Official Journal,* February, 1922; pp. 165-169.
[7] *Ibid.,* pp. 105, 107.
[8] *Ibid.,* p. 108.

with minorities for member states was followed with regard to this minority in a non-member State.[9]

On January 23rd, 1922, it appears that the Supreme Council, through the Italian representative in Esthonia, invited that Government to act in accordance with the above resolution of the League Council.[10] On January 30th, 1922, through its representative in Moscow, the Esthonian Government enquired whether the Russian Government would be willing to submit the dispute for the consideration of the League under Article 17 of the Covenant and to send a representative to the Council for that purpose.

On February 2nd, 1922, the Russian Government replied accusing Esthonia of openly supporting Finland by "abetting the formation of organizations which have been established in Esthonia to give active assistance to the detachments of brigands" from Finland who have invaded Soviet territory, and, also, by organizing insurrections in Carelia. It considered these acts as sufficient reason to decline the invitation. It added further that the matter was domestic and offers of intervention were an intolerable interference and violation of sovereignty; and that "it particularly objects to interference by the so-called League of Nations which includes governments openly hostile to Russia."[11] While these conversations were in progress, the Eastern Carelians revolted against Russian rule. Early in the winter of 1921, fighting took place and, on February 16th, 1922, the Carelian army was defeated and forced to retire to Finland.[12]

When the Assembly met on September 4th, 1922, the report of the Secretary-General contained a reference to the effect that the Council had received no official information regarding the result of the steps taken in pursuance of the desire expressed in its resolution.[13] On September 6th, 1922, the Finnish representative addressed the Assembly, stating that the opinion of several foreign jurists had been placed at the disposal of the Secretariat. He intimated that he intended to request the Council to apply to the Permanent Court, "the duly authorized organ of the League" for an opinion.[14] On November 10th,

[9] For regulations, see Chap. III, p. 70.

[10] *P. C. of I. J., Series C, No. 3,* Vol. II; pp. 75-77.

[11] *Ibid.,* pp. 78-79.

[12] *The White Book,* dated February, 1922, and issued by the Finnish Minister for Foreign Affairs, contains the correspondence between the Governments of Finland and Russia from October 14th, 1920, until February 21st, 1922; also, details of the specific questions at issue between the two countries.

[13] *Report of the Secretary-General to the Third Assembly;* p. 34.

[14] *Records of the Third Assembly,* Vol. I; p. 50.

1922, the Finnish Government made a formal request to the Council that the matter be submitted to the Court.

The Council, however, was in doubt about submitting to the Court a matter wherein Russia had questioned its competence. At its meeting in February, 1923, it postponed action; [15] on March 12th, 1923, a Commission of Finnish Jurists addressed a memorandum to the League, setting forth the reasons for action;[16] and on April 19th, 1923, M. Salandra (Italy) presented a preliminary report on the question, approving in principle, of granting the request on the following grounds: (1) The Council had the legal right to refer the question as there is no restriction upon its right to submit any question. (2) The League was competent to submit it, as part of its duty was to help member states to maintain good relations with their neighbors. (3) Although Russia, not a member, would not be bound by the decision, there would be certain advantages: (a) of clearing up legal points which are the subject of dispute; (b) of letting Finland know if it has the right to continue the discussion with Russia; and (c) increasing chances of a successful settlement. (4) The League of Nations could not incur any subsequent responsibility following an opinion by the Court. He recommended that a resolution be passed submitting the question to the Court; which resolution was adopted on April 21st, 1923, as follows:[17]

"The Council of the League of Nations requests the Permanent Court of International Justice to give an advisory opinion on the following question, taking into consideration the information which the countries concerned may equally present to the Court.

"Do Articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein."

The adoption of this resolution abandoned the position taken in the resolution of January 14th, 1922. It shifted the dispute from Articles 11 and 17 to Article 15 of the Covenant and indicated that the Council was willing to take up the dispute even when one of the parties had refused consent. The resolution did not submit to the Court the interpretation of the rights of the Council under Article 17 which had been questioned, but an interpretation of paragraph 8 of Article 15.

[15] *Official Journal*, March, 1923; p. 222.
[16] *Ibid.*, June; p. 660.
[17] *Ibid.*, June, 1923; p. 664.

THE QUESTION BEFORE THE COURT

On May 19th, 1923, the Secretary-General of the Court sent a communication to the Russian Government concerning the request made by the League of Nations. The Russian Government was not requested to appear as a party, but was notified "in accordance with the principle laid down in the rules of the Court by which governments and international organizations which are likely to be able to furnish information on a question submitted to the Court for an advisory opinion, shall receive notice of such question.[18] To this notice, M. Tchitcherin sent the following reply, dated June 11th:[19]

"The Russian Government finds it impossible to take any part in the proceedings, without legal value either in substance or in form, which the Permanent Court intends to institute as regards the Carelian question. Whereas the Workers' Commune of Carelia is an autonomous portion of the Russian Federation, not having right to independent international relations; whereas its autonomy is based on the decree of the Pan-Russian Central Executive Council, dated June 8th, 1920, which was enacted before the examination of this question by the Russo-Finnish Peace Conference of Dorpat; furthermore, whereas the Treaty of Dorpat, in connection with another matter, refers to the autonomous territory of Carelia as already existing without imposing any obligation in this respect upon Russia; furthermore, whereas Berzine, the President of the Russian Delegation, at the meeting of October 14th, 1920, brought the fact that Carelia was autonomous to the knowledge of the Finnish Delegation solely for their information; furthermore, whereas in a Note dated December 5th, 1920, and addressed to the Finnish Charge d'affaires, Tchitcherin, the Commissary of the People, protested categorically against the action taken by the Finnish Government in placing the Eastern Carelian question before the League of Nations, a course which, in the view of the Russian Government, constituted an act of hostility to the Russian Federation and an intervention in its domestic affairs; furthermore, whereas, in an official communication published on June 18th, 1922, the Commissary of the People for Foreign Affairs declared that the Russian Government absolutely repudiated the claim of the so-called League of Nations to intervene in the question of the internal situation of Carelia and stated that any attempt on the part of any power to apply to Russia an article of the Covenant of the League relating to disputes between one of its members and a non-participating State would be regarded by the Russian Government as an act of hostility to the Russian State: the Russian Government categorically refuses to take any part in the examination of this question by the League of Nations or by the Permanent Court. Apart from considerations of law, according to which the question of the status of Carelia is a matter of Russian domestic jurisdiction, the Soviet Government is compelled to affirm that it cannot consider the so-called League of Nations and the Permanent Court as

[18] *P. C. of I. J., Series C, No. 3*, Vol. I; p. 69. [19] *Ibid.*

impartial in this matter, having regard to the fact that the majority of the powers belonging to the League of Nations have not yet accorded the Soviet Government *de jure* recognition, and several of them refuse even to enter into *de facto* relations with it. This situation is further borne out by the fact that the Council of the League of Nations or the Powers which control it, represented by the Council of Ambassadors, have often taken decisions obviously directed against the most vital interests of the Soviet Republics, and have done so without even asking the views of the Soviet Government. This occurred when the annexation of Bessarabia to Roumania was recognized by them and again when a regime was established at Memel which debarred Russia from any voice in the question of navigation on the Niemen, or again, when Eastern Galicia, the great majority of whose population is Ukrainian, was annexed to Poland. These are the reasons which render it quite impossible for the Russian Government to take any part in the discussion of the Carelian question before the Permanent Court."

From this note, the objections of the Russian Government appear to have been the following; (1) That the instrument in question was not of a bi-lateral character; (2) that the question was not international; (3) that the act of Finland in submitting the question to the League was an act of hostility; and (4) that neither the League nor the Court constituted an impartial tribunal. For these reasons the Russian Government declined to take part in the proceedings before the Court.

THE OPINION OF THE COURT

On June 22nd, 1923, the Court began the consideration of the dispute. The question before it was whether there was a contractual obligation between Finland and Russia under the Treaty of Dorpat and, if not, did the request of Finland constitute an act of interference in Russian domestic affairs? The Court heard the representative of the Finnish Government, M. Erich, and it had before it a memorandum prepared by three jurists, namely, Prof. Wilhelm Chydenias, Dean of the Faculty of Law, University of Helsingfors; M. R. Erich, Professor of International Law, University of Helsingfors, and M. R. Hermanson, sometime Professor of Public Law, University of Helsingfors, which memorandum adduced the following reasons in favor of the jurisdiction of the Court—(1) The Covenant did not lay down the precise terms of the questions to be submitted. (2) The question was of a legal nature. (3) The Court may give an opinion on an international dispute as a whole or on a preliminary question or on a separate question or on a special point. (4) The question had a political aspect, but it should not be given preference over legal aspects, as this would

be in opposition to the fundamental principles of the League. (5) The Council had acknowledged its powers to deal with the question. (6) An advisory opinion may be given without the agreement of both parties, though a judgment can not be. (7) The information required by the Court could be obtained by an investigation in Eastern Carelia and from available Russian Documents. (8) That Russia might disregard the opinion of the Court was no bar to consideration of the question.[20]

With this point of view, and that of the Council, as expressed in Signor Salandra's report, the majority of the Court disagreed. It delivered an opinion on June 23rd, 1923, in which it stated, in effect, that it could not grant an opinion. It availed itself of its right of discretion under the permissive clause of Article 14 of the Covenant upon the following grounds: (1) The question submitted involved an actual dispute, necessitating facts. The Court would be at a great disadvantage in ascertaining facts, inasmuch as Russia refused to take part; and there would not be available to the Court sufficient material to enable it to arrive at any judicial conclusion on a basis of fact. (2) No state, without its consent, could be compelled to submit its dispute to any form of pacific settlement. (3) States not members of the League are not bound by its Covenant. (4) The submission of a dispute therefore, under the Covenant could take place only by virtue of consent. (5) Such consent had never been given by Russia. (6) "The question put to the Court is not one of abstract law, but concerns directly the main point of the controversy between Finland and Russia and can only be decided by an investigation into the facts underlying the case. Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."[21]

From this opinion four judges dissented, namely, M. Weiss (France); M. Nyholm (Denmark); M. de Bustamente (Cuba); and M. Altamira (Spain).

THE QUESTION RETURNS TO THE COUNCIL

The above opinion did not satisfy the League of Nations. Especially was this true on the ground that it appeared to render futile any further compulsory proceedings by the Council under the provisions of Article 17. The first notice taken of the opinion was in the

[20] *P. C. of I. J., Series C, No. 3,* Vol. II; p. 122.
[21] *P. C. of I. J., Series B, No. 5;* pp. 28-29.

Assembly, which passed on September 24th, 1923, a resolution, as follows:[22]

"The Assembly of the League of Nations, recognizing the importance of the question of Eastern Carelia, notes the declaration of the Finnish delegation that the Finnish Government, in the absence of any decision or any contrary opinion pronounced by any international jurisdiction, maintains its right to consider the clauses of the Treaty of Dorpat and the supplementary declarations relating to the status of Eastern Carelia, as agreements of an international order.

"And requests the Council to continue to collect all useful information relating to this question with a view to seeking any satisfactory solution rendered possible by subsequent events."

When the Council met on September 27th, it had before it this resolution and an additional memorandum from the representative of the Finnish Government, M. Enckell, which pointed out the differences between the view held by the Council and that taken by the Court and pronounced it "regrettable if the organs of the League of Nations were to fail or to be condemned to inactivity and impotence as soon as the League was confronted by a Power which was not a member of the League or was even hostile to it. To many members of the League such a state of affairs would mean an undesirable weakening of the guarantees provided in the Covenant."[23]

The sentiment of the Council found expression in the following proposed resolution:[24]

"The Council notes the Court's opinion, thanking the Court for the care it has taken in the consideration of this matter. Whilst noting the view of the Court that an advisory opinion concerning this question would have involved an investigation into facts for which certain conditions were lacking, the Council feels sure that the opinion expressed by the Court in connection with the procedure described in Article 17 of the Covenant cannot exclude the possibility of resort by the Council to any action, including a request for an advisory opinion from the Court, on a matter in which a State, non-member of the League and unwilling to give information is involved, if the circumstances should make such action necessary to enable the Council to fulfill its functions under the Covenant of the League in the interests of peace."

As this resolution appeared to "remonstrate" with the Court which was not deemed to be desirable, and in view of Viscount Cecil's observation: "that the opinion given by the Court was an opinion based upon the circumstances of a specific case and was not intended to lay down any general principle of action,"[25] it seemed wiser to express

[22] *Verbatim Record of the Fourth Assembly*, September, 1923; p. 5.
[23] *Official Journal*, November, 1923; p. 1501.
[24] *Ibid.*, p. 1336.
[25] *Ibid.*, p. 1336.

no view and leave a clear field for future action independent of the opinion in this particular instance. The resolution, therefore, was condensed into one sentence, as follows: "The Council notes the opinion expressed by the Court." [26] This indicates that the question of Eastern Carelia will not be re-submitted, but that the Council reserves the right to interpret Article 17 as it may deem expedient in future circumstances.

COMMENTARY

In view of the fact that the Council may exercise the privilege of disregarding the opinion of the Court as a general principle and reserves its right to consider the compulsory features of Article 17 in the future, it may be of interest to recapitulate the principles laid down in this important opinion: (1) A resolution of the Council does not in itself confer jurisdiction upon the Court to render an advisory opinion. (2) The Court may exercise its discretion under the permissive clause of Article 14 and refuse to render an opinion if it believes it to be in conflict with sound principles of law. (3) The Court, when an actual dispute is involved, and when an opinion is equivalent to deciding the dispute, will give to the subject the same consideration as when rendering a judgment. (4) It is established in international law that no state without its consent can be compelled to submit its dispute either to mediation or to arbitration *or to any kind of pacific settlement*, thus rendering an adverse opinion against the compulsory features of Article 17. (5) The request for an advisory opinion will not necessarily be refused by the Court when it is opposed by a member of the League, as "members of the League, having accepted the Covenant, are under the obligation resulting from the provisions of this pact dealing with the pacific settlement of international disputes." [27]

The question whether an advisory opinion delivered in an actual controversy is to be limited to that occasion or whether it may lay down a general principle interpreting the Covenant is of interest in view of Viscount Cecil's observation. Article 59 of the Statute states that the "decision of the Court has no binding force except between the parties and in respect to that particular case." Was the opinion a "decision"; were Russia and Finland "parties"; was the controversy a "case"? If not, is the Council bound to regard the opinion as an interpretation of Article 17? Or may it be rejected as only an advisory opinion, having no binding force in any subsequent controversy?

[26] *Official Journal*, November, 1923; p. 1337.
[27] *P. C. of I. J., Series B, No. 5;* p. 27.

CHAPTER XXX

GERMAN SETTLERS IN POLAND

It is estimated that fifty million people are now living as minorities under alien rule, protected by Minority Treaties.[1] There are many millions of others not so protected. Next to territorial questions, problems affecting these racial groups, differing in religion, race, culture, language, and habits of thought, are the cause of reprisals and of wars. Little or nothing is actually known by the general public concerning the plight of these people, for such is the right of sovereignty that publicity on this particular aspect of international affairs has been prohibited by the League of Nations.

The following narrative recounts the struggle for rights by a small part of this great body of minorities. It is an illustration of the fact that the costs of war fall most heavily on the people and it is typical of the difficulties which the Allied Powers are encountering in protecting the minorities they have created. For in this instance an effort was made to protect a minority, bringing into play all of the machinery provided by the Peace Treaties—including the League of Nations, the Conference of Ambassadors, special committees of jurists, the Court of Justice, and an arbitral tribunal.

I.

GERMAN COLONIZATION

Under Article 87 of the Treaty of Versailles, Germany recognized the complete independence of Poland and renounced in its favor all rights and title over certain areas (defined in Article 27) including the provinces of Posen and of West Prussia. By the transfer of this German territory to Poland, a number of colonists, formerly German nationalists, became domiciled in the new Polish territory. These colonists had been settled in these two provinces under a law of April 26th, 1886,[2] which created a Settlement Commission having at its disposal an initial fund of 550,000,000 marks. This fund was to be used for the acquirement of land, payment of first costs of settlement and erection of

[1] *Official Journal,* February, 1924; p. 359.

[2] Text of law of April 26th, 1886, *P. C. of I. J., Series C, No. 3,* Vol. III, Part II; p. 934.

buildings and equipment, and for communal life (schools, churches, and other necessities.) [3]

These contracts for settlement of colonists were of two classes: (1) *Rentengutsverträge,* being a contract of sale with the Colonization Commission implying payment in cash for equipment, and a perpetual rental of 3% on the capital value of the land. When the contract was completed, the settler was entitled to an *Auflassung.* The transaction was then entered in a Title Deed Book and the colonist became the owner of the land. The state, however, reserved the right to redeem the rental at several times the value, repurchasing the land under certain stipulated conditions. The colonist was permitted to "alienate" or dispose of his right against the perpetual rent with the concurrence of the *Rentenberechtigten* (landlord), and a conciliation (settlement) authority had the final determination in the case of disagreement between landlord and tenant.

The second class of colonists occupied state lands under a lease [4] known as *Pachtverträge,* entered into in a manner similar to the rent contract above described. The lease was good for a term of years, and provision was made whereby the lease tenant could become a rent tenant by observing certain stipulated formalities.

When these German provinces were transferred to Poland there were 17,240 colonists holding 262,942 acres of land as rent tenants who had completed their contracts before the signing of the armistice, and who had before that date received their *Auflassung,* thus possessing the evidence of such completion. Their right or title could hardly be called into question.[5] There were, however, 1,565 tenants who occupied land but who did not receive their *Auflassung* until after the armistice was signed, although there was no question that all payments and other obligations had been fully met. There were 1,216 settlers who became tenants after the armistice and had received no *Auflassung.* These two classes, numbering 2,781 tenants, the Polish Government proposed to evict under an agrarian law, passed on July 14th, 1920.[6]

THE POLISH AGRARIAN LAW

This law, in so far as it relates to German colonists, was based upon Article 256 of the Versailles Treaty, as follows:

[3] Similar to private colonization schemes in the United States to establish immigrants on the land, of which McRae, North Carolina, is typical.

[4] *Model of Lease, P. C. of I. J., Series C, No. 3,* Vol. III, Part I; p. 347.

[5] For reference to a bill introduced into the Polish Diet to deprive these settlers of their land, see *Official Journal,* February, 1924; p. 360.

[6] *P. C. of I. J., Series C, No. 3,* Vol. I; p. 503.

"Article 256. Powers to which German territory is ceded shall acquire all property and possessions situated therein belonging to the German Empire or to the German States, and the value of such acquisitions shall be fixed by the Reparation Commission, and paid by the State acquiring the territory to the Reparation Commission for the credit of the German Government on account of the sums due for reparation.

"For the purposes of this Article the property and possessions of the German Empire and States shall be deemed to include all the property of the Crown, the Empire or the States, and the private property of the former German Emperor and other Royal personages."

Articles 1 and 2 of the agrarian law which provided for the expulsion are as follows:[7]

"Article 1. In all cases in which the Crown, the German Reich, the German States, the institutions of the Reich or of the German States, the ex-Emperor of Germany or other members of the German reigning houses, are, or were, after November 11th, 1918, inscribed in the land registers of the former Prussian provinces as owners or possessors of real rights, the Polish Courts shall, in accordance with the terms of the Treaty of Versailles of June 28th, 1919, inscribe *ex officio* in such registers, the Treasury of the Polish State, in place of the persons or persons in law above mentioned.

"Article 2. Should one of the persons or persons in law referred to in Article 1, after November 11th, 1918, have alienated or encumbered the immovable property in question, or if, after November 11th, 1918, a real right standing in the name of the personalities enumerated in Article 1 has been at their request, or with their consent, transferred, suppressed, or has undergone any other change, the Courts shall restore the entry in the land register as it would have been had the persons enumerated in Article 1 not made such request or given the consent necessary to effect the changes made in the land register.

"If the Registry of Mortgages receives a declaration of hypothec, or of a mortgage upon the estate or upon the rent, and, if, and as soon as, it appears from the contents of the declaration that any one of the persons enumerated in Article 1 is the beneficiary under the hypothec or mortgage, or was so after November 11th, 1918, the Court in that case shall *ex officio* inscribe the Treasury of the Polish State as such beneficiary under the hypothec or mortgage. The provisions of paragraph 1 of this Article with regard to the restoration of the previous entries in the land registers, shall be applied in a similar manner to the contents of these declarations."

The Polish Government in the execution of this law proceeded through its local courts to evict all of the occupants of the land who had no *Auflassung* or who had acquired it since the armistice—on the ground that the *Auflassung* was essential to complete the contract and that those occupying the land since the armistice did so illegally. The settlers contended that the *Auflassung* was not essential to their title

[7] *P. C. of I. J., Series B, No. 6;* pp. 14-15.

but was only an evidence of title, to which they had full right when all other conditions had been fulfilled. Thus, the dispute arose: (1) as to the rights of colonists possessing an *Auflassung* obtained after the armistice, and of colonists fulfilling all other conditions but possessing none; (2) as to what importance was to be attached to the *Auflassung;* and (3) as to what importance was to be attached to the armistice date in dealing with these property rights.

THE POLISH MINORITY TREATY

Had the Allied Powers not insisted upon Poland signing a Minority Treaty as a condition of establishing the new state, the colonists could have obtained no redress whatever. Under that Treaty they possessed two rights—one through the League of Nations and the other through the Court of Justice.

The Minority Treaty was established under Article 93 of the Versailles Treaty, reading as follows:

"Poland accepts and agrees to embody in a Treaty with the Principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of inhabitants of Poland who differ from the majority of the population in race, language or religion."

The material part of the Minority Treaty, negotiated in accordance with Article 93, between Poland and the Principal Allied Powers, on June 28th, 1919, is contained in Articles 2, 7 and 12 as follows:

"Article 2, par. 1. Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.

"Article 7, par. 1. All Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion.

"Article 12, pars. 1 and 2. Poland agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations. They shall not be modified without the assent of a majority of the Council of the League of Nations. The United States, the British Empire, France, Italy and Japan, hereby agree not to withhold their assent from any modification in these Articles which is in due form assented to by a majority of the Council of the League of Nations.

"Poland agrees that any member of the Council of the League of Nations shall have the right to bring to the attention of the Council any infraction, or any danger of infraction, of any of these obligations, and that the Council may thereupon take such action and give such direction as it may deem proper and effective in the circumstances."

It will be observed that the responsibility for protection is vested in a member of the Council, and that some such member must undertake the responsibility of bringing the matter before the Council; otherwise the petitions of minorities must go unheeded.[8]

THE COMPLAINT OF THE SETTLERS

The first complaint sent to the League of Nations was made by the Union of German Farmers on May 26th, 1921. It stated that Articles 1, 2, 7, 8 and 12 of the Minority Treaty were being violated and requested the Council to take up the matter; also that the German farmers be represented at the hearing. The complainant presented a memorandum in three parts, containing (1) a statement of facts, (2) a statement of the juridical points involved; and (3) the proposal that the leases be recognized; and if not, that the settlers should be permitted to dispose of their property.[9] The matter was declared to be urgent, as within three weeks the orders for expulsions were to become effective.

The Secretary-General forwarded this petition to members of the League on May 26th, 1921, and on June 2nd he replied to the Union of German Farmers that the question could not be put on the agenda of the Council unless one of the members brought it to the attention of that body. When the Council met on June 17th, 1921, the question was ignored, although on October 25th, 1920, a resolution had been passed authorizing the appointment of a committee to examine such petitions.[10] At the same session in June, 1921, the Council adopted a procedure for dealing with minorities which further delayed the consideration of such petitions and granted greater rights of sovereignty to the states possessing minorities; but provided that in urgent cases the Secretary-General might communicate the matter to the representative of the country complained against.[11]

THE CONFERENCE OF AMBASSADORS

On October 3rd and November 9th, 1921, the German Government appealed to the Conference of Ambassadors, stating that the Polish

[8] Chap. III, p. 74, for description of procedure.

[9] The *Official Journal* does not report this complaint. It will be found only in French in *P. C. of I. J., Series C, No. 3,* Vol. III, Part 1; p. 383.

[10] The resolution adopted by the Council on October 25th, 1920, provides that any petition to the League concerning the infraction or any threat of infraction of the clauses of the Treaties for the protection of minorities shall be considered by the President of the Council and two members appointed by him. (*Official Journal,* March, 1922; p. 253.)

[11] Chap. III; p. 75.

Government on October 19th, 1921, had notified 3,000 colonists to leave their properties before December 1st. On November 30th, the German Government again addressed the Conference, requesting relief. On November 29th, 1921, the Conference communicated with the Polish Government, stating that it was examining the complaints and advised the Government to take no further steps until the examination had been completed. The Polish Government granted a delay of six months, dating from August 6th, 1921. On December 16th, 1921, the Conference informed the Polish Minister at Paris and the German Ambassador at Paris that they had completed their investigation and invited the two governments concerned to enter into negotiations as soon as possible and offered the services of M. Alphand to conduct the negotiations. On February 6th, 1922, the six months period was to expire. On February 2nd the German Government applied for a further extension. The President of the Conference of Ambassadors replied on February 18th, 1922, that the Conference had proffered its good offices, that the German Government had not made use of them and the Conference was not in a position to renew the offer or to take any further action on the German complaint.[12]

THE QUESTION RETURNS TO THE COUNCIL

On November 8th, 1921, a complaint came to the League from another quarter, namely, the Germanic League, with headquarters in Bromberg, Poland. These petitioners stated their case as follows:[13]

"In accordance with the Polish Law of July 14th, 1920, the German colonists, who have settled on properties in virtue of contracts entered into in good and due form with the Prussian Colonisation Commission *(Ansiedlungskommission)*, but who have not been entered as landowners in the Land Register, or whose entry *(Auflassung)* was made after November 11th, 1918, have been called upon to evacuate their homes although the entry *(Auflassung)* only constitutes the registration of a contract which had been in existence for a long time. Entry could not take place during the war, since the surveys could not be brought up to date as regards the properties referred to and the work of the Courts entrusted with the registration had been impeded.

"In accordance with the contracts concluded between the Prussian State and the colonists, the State reserves the right of re-purchase; this right may be exercised, among other cases, upon the death of the owner. This stipulation was made with the intention of keeping the property in the

[12] It appears, however, that during this period of suspension agreed to by Poland at least four cases of expulsion took place. *(P. C. of I. J., Series C, No. 3,* Vol. III, Part II; p. 961; in French.) For above correspondence see *Ibid.,* Part I; pp. 368-371 (in French).

[13] *Official Journal,* June, 1922; p. 704.

hands of German owners. Moreover, the entries in the land registers regarding real estate grants the right of transfer of the property as a whole (*Anerbenrecht*). This right implies that the principal heir inherits the property without the fact being entered in the Land Register. The Polish Government claims the right of re-purchase and demands that, without exception, in the case of the death of the owner as well as in the case of the sale of the property, this latter should pass into the hands of a person of Polish race, to the absolute exclusion of any successor of German race. As a rule, the Polish Government hardly ever grants the *Auflassung* to a German. The petitioners brought their case before the Polish Courts, which replied that the Law of July 14th, 1920, alone concerned them, and that it was not for them to consider whether this law was in conformity with the treaties or not."

In reply, Poland claimed that during the period between the Armistice and the coming into force of the Treaty, large numbers of colonists had arrived who could show no right or title to the land they held. In the opinion of the Polish Government, the law of July 14th, 1920, constituted a confirmation of the rights granted to Poland under the provisions of Article 256 of the Treaty, transferring the territory.

The questions thus presented to the League were the following: (a) The Polish Government regards itself under Article 256 of the Treaty of Versailles as the legitimate owner of the holdings held by the German colonists who had acquired their lease prior to November 11th, 1918, but who had not acquired an *Auflassung;* and considers itself entitled to cancel all the contracts and evict the tenants; (b) the Polish Government also refuses to recognize the validity of leases entered into by German colonists after November 11th, 1918, whether they had acquired an *Auflassung* or not; (c) the Polish Government refused to recognize the rights of colonists who had purchased their land from other colonists.

This time the Council considered the complaint to be urgent, and it was referred to a special committee consisting of the President and two members of the Council, a procedure authorized on October 25th, 1920; [14] and which might with propriety have been resorted to when the first complaint was received six months earlier, had the Allied Powers consented. The substance of the complaint was communicated to the Polish Government, which replied that in accordance with the action taken by the Conference of Ambassadors, the time limit for evictions had been extended. In a telegram sent to the Council from Warsaw on November 16th, the Polish representative stated that his Government, moved by charitable motives [15] and irrespective of orders

[14] Chap. III, p. 75.

[15] *Official Journal,* March, 1922; p. 254.

issued by the courts, had provided that the expulsions "should only be carried out by degrees and in no case before May 1st, 1922." [16]

The Committee, to whom the matter was referred, was composed of M. Hymans (Belgium), President of the Council; Marquis Imperiali (Italy), and Viscount Ishii (Japan). On January 14th, 1922, it rendered a report to the Council which stated that, in view of the fact that these settlers were threatened with eviction, the Council should request the Polish Government to suspend any measures which might in any way affect the present situation, until the Council had the opportunity of considering the observations of the Polish Government; and to suspend measures which might prejudice the final settlement of a complaint then before the Council, which had been made by Herr von Tiedemann, a German settler who was threatened with eviction.[17]

The Council accepted this report, embodied it in a resolution on January 14th, 1922, and forwarded it to the Polish Government. On January 17th, that Government replied that the matter of expulsions was no longer urgent, as the Polish Government had consented sometime previously to suspend execution of its decision in the matter. As to Herr von Tiedemann, the note observed:[18]

"I am glad to be able to inform you that in consequence of Herr von Tiedemann's death, the Polish authorities immediately suspended the liquidation of his property."

The Special Committee continued its work and reported to the Council at its meeting on March 28th, 1922. The report stated that the Polish Government, on January 24th, 1922, had replied to the complaint of November 8th, 1921; that it presented complex questions which the Committee had studied, but could not resolve; and that the Committee was of the opinion, therefore, that the Council should request Poland to extend the time of suspension of expulsions until October 1st, 1922.[19] This request was transmitted by the Council to the Polish representative, M. Askenazy, who promised to bring it to the attention of his Government,[20] and to give the request his support.[21]

[16] It appears that at least 22 expulsions were put into effect before the expiration of the period named. *(P. C. of I. J., Series C, No. 3,* Vol. III, Part II; p. 961.)

[17] *Official Journal,* March, 1922; p. 254.

[18] *Ibid.,* p. 255.

[19] *Official Journal,* May, 1922; p. 419.

[20] *Ibid.,* p. 383.

[21] Between this time, March 28th, 1922, and the next meeting of the Council on May 17th, 1922, approximately 50 expulsions are reported to have been executed by the Polish Government. *(P. C. of I. J., Series C, No. 3,* Vol. III, Part II; p. 961.)

On May 17th, 1922, the Special Committee reached the following conclusions:[22] (1) With regard to settlers who obtained their lease before the Armistice but not the *Auflassung*, if their registry is a mere formality, so that the person possessing the contract has the right to obtain such *Auflassung* then the cancellation of leases solely of persons belonging to the German Minority raises the question whether these acts are compatible with the terms of the Minority Treaty; (2) with regard to persons obtaining their contracts and *Auflassung* after the Armistice, this question depends upon the importance to be attached to that date; (3) with regard to colonists purchasing their land from other colonists, the right of re-purchase by the German state seems to have been an exceptional measure resorted to by the Colonization Commission in regard to the law governing the transfer of the whole of the property to the principal heir, and if it is now applied exclusively in favor of the Poles, so as to make it difficult for the settler to retain his lands, it is doubtful whether this practice is consistent with Article 7 of the Minority Treaty. The report containing these conclusions was adopted by the Council on May 17th, 1922, in the following resolution:[23]

"I. A copy of this report shall be sent to the Polish Government, which is requested to forward to the Council of the League of Nations as soon as possible detailed information upon the questions of fact, as well as upon the questions of law, referred to in the report.

"II. The Representative of the Polish Government is invited to consider, in conjunction with the Secretary-General, the various questions of law raised in the report, in order to enable the Council to decide whether, and if so, on what questions, the Permanent Court of International Justice should be asked to give an opinion.

"III. The Council earnestly requests the Polish Government to postpone, until the Council has had an opportunity of taking a decision upon the matter, any administrative or judicial measures likely to affect the normal position of persons of German origin engaged in agricultural work who are Polish subjects or whose status as Polish subjects is dependent upon the decision taken with regard to the questions of interpretation raised in the report."

In a note dated July 3rd, 1922, the Polish Minister of Foreign Affairs replied to the communication contained in this report. With regard to Points 1 and 2, the Polish Government was in agreement; with regard to Point 3 it granted a respite until the end of the next ordinary session of the Council, to colonists who had a contract before the

[22] *Official Journal*, June, 1922; p. 705.
[23] *Ibid.*, p. 555.

Armistice and who had not obtained the *Auflassung;* and to colonists who on the day of the Armistice were in occupation and whose lease would not have expired on that day, if subsequently an illegal purchase from the former Colonization Commission had not taken place. "If possible," the recommendations of the Council were to be carried out.[24] The information sent by the Polish Government contained the declaration that the *Auflassung* was not a mere formality, but was an essential, and contracts not thus completed were illegal and would not be recognized; that the Polish Government had a right to expel all settlers who had only *concluded* their contracts by the *Auflassung* after the Armistice; that the right of repurchase in the event of a transfer of a colonist of the property was justified on economic grounds and rested legally on the practices of the Colonization Commission to which Poland had succeeded.

It will be observed that up to this time the proceedings had been entrusted to a Special Committee. It appears that no member had called the attention of the Council to the dispute in accordance with the provisions of the Minority Treaty, but instead this committee had advised the Council to take the following irregular and apparently unauthorized action:[25] On January 14th, 1922, the Council requested an extension of time; on March 28th, it requested extension of time until October 1st, 1922; on May 17th, the conclusions of the special committee were adopted; on July 3rd, the Polish Government refused to accept these conclusions. The result was a deadlock.

THE COMMITTEE OF JURISTS

In this dilemma, the Council resorted to a *rapporteur,* appointing M. da Gama (Brazil) to that position. When the Council met on September 9th, 1922, sixteen months after it had received the first petition from the settlers, it received M. da Gama's report, summarizing the history of the situation and the information received from the Polish Government.[26] In view of the legal questions presented, the report recommended that the Council appoint a Committee of Jurists of which recommendation the Council approved. This Committee was

[24] *Official Journal,* August, 1922; p. 918.

[25] During the period between November 8th, 1921, when the Council assumed jurisdiction, and July 3rd, 1922, the date of the Polish consent to grant a respite, and during the activities of the Special Committee, the Polish Government executed 392 expulsions, indicating that it considered the action taken by the League as incompetent, which question it definitely raised later before the Court (p. 578). *(P. C. of I. J., Series C, No. 3,* Vol. III, Part II; p. 962.

[26] *Official Journal,* November, 1922; p. 1293.

composed of M. Botella (Spain); M. Fromageot (France); Sir Cecil Hurst (Great Britain); and Dr. Van Hamel, director of the Legal Section of the Secretariat. On September 30th, M. da Gama presented a report containing the findings of this Committee, which were as follows:[27]

Question 1. "Whether those colonists who, before the date of the Armistice, had received official contracts with the German Colonisation Commission, but who before that date had not been registered (had not obtained *Auflassung),* were liable to expulsion from their properties by the Polish Government?" Answer: "Various circumstances, chiefly delay in delimitation and the drawing up of plans, to which were added the great difficulties due to the war, justify the irregular nature of the transfer, and it would scarcely seem fair to invoke the lack of legal title against these colonists, as this is not due to any fault on their part, provided that these colonists have fulfilled in every other respect all the stipulations entailed by their contract."

Question 2. "Whether the colonists who had received contracts from the German Colonization Commission after the date of the Armistice should be treated in a special manner and for what reasons?" Answer: "A second category of colonists has occupied and still occupies properties by virtue of contracts granted when—hostilities having ceased (November 11th, 1918) —everyone knew that, owing to the circumstances under which the cessation of hostilities had taken place, the territories in respect of which the Prussian Government granted the contracts in question to Germans, would cease to belong to Germany, and would henceforward no longer be under German colonization.

"Contracts granted in such circumstances and in respect of State lands should not, as a matter of justice, be put forward as against the interests of the Polish Government. If the lands in question, at a date previous to the signing of the contracts, were already in the hands of colonists in virtue of leases concluded before November 11th, 1918, and not yet expired, these colonists should be left in possession of the lands in conformity with the terms of these leases."

Question 3. "The question of the right of repurchase, laid down in contracts with the German Colonization Commission." Answer: "As contracts granted before November 11th, 1918, and not regularized in accordance with the manner prescribed above, must be regarded as definitely granted, all the terms of the contracts are applicable, and the Polish Government is therefore entitled to exercise in respect of these contracts the right of repurchase, which is one of the conditions of the contract."

On September 30th, 1922, the Council adopted the report and passed the following resolution:[28]

"The Council takes note of the present report and requests the representative of the Polish Government to bring it to the notice of his Government at the earliest possible moment."

[27] *Official Journal,* November, 1922; p. 1299.
[28] *Ibid.,* p. 1301.

THE COMPETENCE OF THE LEAGUE

The Polish Government, having succeeded, with help from certain Council members, in delaying action for a period of sixteen months, during which time the expulsions had reached one fifth of the total number it intended to expel, resorted to a new line of tactics. In a note dated December 7th, 1922,[29] it replied to this resolution by raising the question of the competence of the League to deal with the subject. It stated that up to the present time, the Polish Government had considered that the Council only sought information, but now it seemed that a practical application of its information was to be made. In a memorandum accompanying this note, the Polish Government set forth its disagreement with the findings of the Committee of Jurists, and challenged the competence of the League.[30]

The Council on February 2nd, 1923, considered this new situation. M. Bourgeois (France) was in favor of a postponement of the question, owing to the Polish refusal to accept the opinion of the jurists. Lord Balfour (Great Britain) and M. Adatci (Japan) were in favor of referring the matter to the Permanent Court. The Council then adopted the report of M. da Gama containing the following proposal:[31]

"(a) A number of colonists who were formerly German nationals, and who are now domiciled in Polish territory previously belonging to Germany, have acquired Polish nationality, particularly in virtue of Article 91 of the Treaty of Versailles. They are occupying their holdings under contracts *(Rentengutsverträge)* which, although concluded with the German Colonization Commission prior to the Armistice of November 11th, 1918, did not receive an *Auflassung* before that date. The Polish Government regards itself as the legitimate owner of these holdings under Article 256 of the Treaty of Versailles and considers itself entitled to cancel the above contracts. In consequence, the Polish authorities have taken certain measures in regard to these colonists, by which the latter will be expelled from the holdings they occupy;

"(b) The Polish authorities will not recognize leases conceded before November 11th, 1918, by the German Government to German nationals who have now become Polish subjects. These are leases over German State properties which have subsequently been transferred to the Polish State in virtue of the Treaty of Versailles, in particular of Article 256;

"Requests the Permanent Court of International Justice to give an advisory opinion on the following questions:

"(1) Do the points referred to in (a) and (b) above involve international obligations of the kind contemplated by the Treaty between the United States of America, the British Empire, France, Italy, Japan and Poland,

[29] *P. C. of I. J., Series C, No. 3;* Vol. III, Part I; p. 244.

[30] See p. 578 for argument before the Court.

[31] *Official Journal,* March, 1923; p. 396.

signed at Versailles on June 28th, 1919, and do these points come within the competence of the League of Nations as defined in that Treaty?

"(2) Should the first question be answered in the affirmative, the Council requests the Court to give an advisory opinion on the question whether the position adopted by the Polish Government and referred to in (a) and (b) above, is in conformity with its international obligations.

"The Secretary-General is authorized to submit this request to the Court, together with all the relevant documents, to explain to the Court the action taken by the Council in this matter, to give all assistance necessary in the examination of the question and, if required, to take steps to be represented before the Court."

Thus came to an end the methods used by the Council which the Polish advocate before the Court of Justice referred to as a procedure "filled with hesitation, with advances and withdrawals and which is dominated by that primordial doubt which has never been dissipated, on the question of the Council's competence." [32] During this period of nearly two years, while the Council was endeavoring to investigate, obtain suspensions, and formulate the question, the Polish Government appears to have evicted 996 colonists, thus recovering one-third of the titles which it claimed.[33] During that time, steps were taken by the League in the following manner: July 14th, 1920, passage of the Polish agrarian law; May 26th, 1921, first notice to the Council of threatened violation of the Minority Treaty; November 8th, 1921, second notice; January 14th, 1922, recommendation by a Special Committee for suspension of the law; March 28th, second recommendation; May 17th, findings of the Committee and third recommendation for suspension of the law; September 9th, summary of dispute and appointment of a Committee of Jurists; September 30th, Committee of Jurists' report adopted; December 7th, rejection by the Polish Government; February 2nd, 1923, question referred to the Court.

COMPULSORY JURISDICTION

In view of the foregoing procrastinating procedure, the question naturally arises as to what had become of the compulsory jurisdiction which the Minority Treaties conferred upon the Court, as provided in Article 12, paragraph 3, as follows:

"Poland further agrees that any difference of opinion as to questions of law or fact arising out of these Articles between the Polish Government and any one of the Principal Allied and Associated Powers or any other Power, a member of the Council of the League of Nations shall be held to be a dispute of an international character under Article 14 of the Cove-

[32] *P. C. of I. J., Series C, No. 3,* Vol. I; p. 699.
[33] *P. C. of I. J., Series C, No. 3,* Vol. III, Part II; p. 962.

nant of the League of Nations. The Polish Government hereby consents that any such dispute shall, if the other party thereto demands, be referred to the Permanent Court of International Justice. The decision of the Permanent Court shall be final and shall have the same force and effect as an award under Article 13 of the Covenant."

The opportunity for an Allied Power to confer this jurisdiction upon the Court was presented when the German Ambassador to Paris on October 3rd, 1921, laid the matter of the danger of infraction of the Treaty before the Conference of Ambassadors. Neither that body nor any member of it, however, elected to invoke the terms of the Minority Treaty. Instead, the Conference suggested that the parties resort to direct negotiation and this having failed, the Allied Powers became parties to the tortuous course followed by the Council. But the delay was needless and the evictions unnecessary, for any one of the Powers signatory to the Minority Treaty could have demanded the reference of this dispute to the Court in which event Poland had agreed to accept its jurisdiction. Thus, the political manipulation of the controversy in an endeavor to effect a conciliation would have been eliminated; the Court would have gathered its own information and heard the arguments; it would not have been limited by the phraseology of the question as framed by the Council nor burdened with elaborate discussions and reports. The Court would have rendered a judgment which would have been respected by Poland, instead of an opinion which has been disregarded.

Had anyone of the Allied Powers been ready to execute the obligation undertaken when they drew both the Versailles and Minority Treaties, the matter could have been disposed of by judicial decision fully and effectively without recourse to the League. *For the League is only essential to the protection of minorities where there is an alleged violation of the Minority Treaty and when the Allied Powers desire to shirk their individual duty and escape responsibility through an organization which has no authority to enforce a finding or an award when secured.* Sir Cecil Hurst has been explicit concerning the reasons these Powers do not take action on these Treaties to which they are signatory. He said: "States which would be quite ready to act collectively in favor of minorities would hesitate long before taking up their cause individually." [34]

On the question of whether this procedure by a signatory state under paragraph 3 of Article 12 was independent of the authority of the Council, the Court, in its opinion, stated:[35]

[34] *Records of the First Assembly,* Committees, Vol. I; p. 378.
[35] *Collection of Advisory Opinions, P. C. of I. J.,* Series B, No. 6; pp. 22-23.

"In connection with the power of the Council, in the performance of its functions under paragraph 2 of Article 12 of the Minorities Treaty, to refer the present matter to the Court for an advisory opinion, the Court does not deem it necessary to interpret paragraph 3 of Article 12, by which Poland consents that any difference of opinion as to questions of law or fact arising out of the preceding articles of the treaty may be brought before the Court by any one of certain Powers for final decision as a dispute of an international character. Paragraph 3, by its very terms, supplements paragraph 2, but is not in any sense a substitute for it; and the fact that a question brought before the Court by the Council under paragraph 2 might conceivably be brought before the Court by a single Power as an international difference under Paragraph 3, cannot be accepted as a reason for preventing the Council from discharging its duties under paragraph 2. The possible range of paragraph 3, so far as concerns the nature of the questions embraced in it, may be as great as that of paragraph 2. If the Court should refuse to take cognizance of a question presented under either paragraph, on the ground that it conceivably might have been or might be presented in a different way under the other, the result might be to make both paragraphs practically ineffective."

THE QUESTION BEFORE THE COURT OF JUSTICE

On August 2nd, 1923, the Court took up the urgent matter referred to it by the Council Resolution of February 3rd. Representatives of Germany, Poland and Great Britain appeared before the Court. The Court had several questions to decide. Among them was the question of the competence of the League of Nations. The Polish representative contended that the Council was not competent as no member state had brought the matter to the attention of the Council but the matter had been brought to its attention only by a special committee; that such a committee was not a substitute for the requirement set forth in the Minority Treaty, but was an internal administrative affair; and that no impersonal abstract organ could be substituted for a *bona fide* member. The Polish representative stated:[36]

"On the other hand, none of these measures can deprive Poland of the safeguard reserved for her by paragraph 2 of Article 12 of the Treaty, namely that, in order to set in motion activity of an external nature by the Council, it is necessary that that action should be set going by a State member of the Council, whose moral responsibility would be fully involved both as regards the Council and as regards Poland. Poland has the right to know, just as any other Power in a similar position would have that right (and that is the least that one can grant her), which is the State whose representative on the Council has taken upon himself the task of accuser."

[36] *P. C. of I. J., Series C, No. 3,* Vol. I; p. 465.

On this question the Court was of the opinion that the Council was competent. It said:[37]

"When the matter now before the Court was first brought to the notice of the League of Nations, it was dealt with by the Secretariat of the League and by the Council in accordance with the procedure established by the Council for such cases, and it was thus repeatedly brought to the attention of the Council by at least three of its members, the representatives of their respective States. Paragraph 2 of Article 12 provides that any Member of the Council may bring to its attention any infraction or danger of infraction of any of the obligations mentioned, and that the Council may thereupon proceed to act on the subject. The Court does not think it material to inquire how or by whom the member or members may have been induced to bring the matter to the Council's attention. The Members of the Council are by terms of the Covenant the representatives of the States by which they are appointed. States can act only by and through their agents and representatives. So far as concerns the procedure of the Council in minority matters, it is for the Council to regulate it. On the other hand, it is impossible to say that the present matter has not been brought to the attention of the Council by any of its members in accordance with the provisions of Article 12. The report of M. da Gama, opens with the statement that the matter had been brought to the attention of the Council by a report presented by three of its members, and it does not matter that these members were members of a committee formed under the Resolution of the Council of October 25th, 1920, to facilitate the performance by the Council of its duties in minorities matters." [38]

As to the rights of the German settlers, the Court said:[39]

"The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights, including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.

"By the Minorities Treaty, Poland has agreed that all Polish nationals shall enjoy the same civil and political rights and the same treatment and security in law as well as in fact. The action taken by the Polish authorities under the Law of July 14th, 1920, and particularly under Article 5 is undoubtedly a virtual annulment of the rights which the settlers acquired under their contracts and therefore an infraction of the obligation concerning their civil rights. It is contrary to the principle of equality in that it subjects the settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject."

[37] *P. C. of I. J., Series B, No. 6;* p. 21.

[38] The Court held that the Special Committee, being made up of three members gave the Council competence to submit the issue. The member states of the League considered this opinion an infringement of sovereignty and passed a resolution on September 5th, 1923, restricting the powers of this Committee as recognized by the Court. (Chap. III; p. 76.)

[39] *P. C. of I. J., Series B, No. 6;* p. 36.

The opinion rendered by the Court on September 10th, 1923, was as follows:[40]

"That the points referred to in (a) and (b) of the Resolution of the Council of the League of Nations of February 3rd, 1923, do involve international obligations of the kind contemplated by the Treaty between the United States of America, the British Empire, France, Italy, Japan and Poland, signed at Versailles on June 28th, 1919, and that these points come within the competence of the League of Nations as defined in that Treaty;

"That the position adopted by the Polish Government and referred to in (a) and (b) of the said Resolution was not in conformity with its international obligations."

The action taken by the Court is in marked contrast to the delay before the Council. In an incredibly short time it cut through the mass of reports, speeches, arguments and technicalities and rendered an opinion as to the competence of the League and on the merits of the case, indicating with what expedition and justice it would have disposed of the entire issue, including compensation and indemnity to the settlers, had it been given an opportunity.

THE QUESTION RETURNS TO THE COUNCIL

The Court rendered an opinion that the position taken by the Polish Government in expelling German settlers, occupying land before the Armistice and not receiving their *Auflassung* before that date, and those holding leases before that date, was not in conformity with the Minority Treaty. Under that treaty, a decision by the Court was to have the same force and effect as an award under Article 13 of the Covenant which provides that in the event of a failure of the party to carry out an award, the Council should propose the steps to be taken to give effect thereto. This is the task upon which the Council is now engaged. On September 27th, 1923, it took note of the opinion of the Court and invited the Polish Government to furnish information on the measures proposed to carry out the opinion, as it appeared that many colonists had lost their lands, and that others had become refugees in Germany.[41] The Polish reply, dated December 1st, 1923,[42] criticized the opinion of the Court and stated that the only terms of settlement to which it might agree would consist of a pecuniary arrangement with colonists no longer in possession of their holdings; and by the with-

[40] *P. C. of I. J., Series B, No. 6;* p. 43.
[41] *Official Journal,* November, 1923; p. 1333.
[42] *Official Journal,* February, 1924; p. 407.

drawal of all orders of expulsion against colonists against whom the orders had not been made effective.[43]

It appeared that the Polish Government held the view that pecuniary settlement should correspond to the amount of direct material damage suffered by the colonists as follows: (a) that portion of the value of the holding which the colonists, by his payments to the German Government for the amortization of debt, would have freed from debt; and (b) the amount employed by him in the construction of buildings on the holding.[44] Whether this proposal covered the actual present value of the holdings, and the taking into account of the harvest, livestock and movable property; also what organ of the Polish Government would settle with the colonists and who would settle differences of opinion and whether the colonists would have representatives, and what would be the methods of payment—these questions were not answered. The Polish Government also indicated that these proposed settlements were concerned with the question of reparations, on the theory that the lands in question formerly belonged to the German state, thereby further complicating final settlement.

As to the colonists still in possession, the Polish Government *desired to continue to obtain judgments against them but was prepared to renounce the execution of them.* This intention was based on the theory that the Polish Government wished to avoid being regarded as the successor to Germany in the matter of private law obligations and also wished to offer the colonists modified contracts when the present contracts were condemned by Court.[45] The matter was discussed at the meeting of the Council on December 14-15, 1923, *when it became evident that further expulsions had taken place, after the opinion of the Court had been rendered.* On this point, Viscount Cecil said: "Moreover, despite the opinion of the Court formulated on September 10th, 1923, other expulsions had since taken place."[46] The *rapporteur* also officially reported to the Council: "If I am correctly informed,

[43] Had the Court rendered a judgment it is conceivable, as in the case of the S. S. Wimbledon, that it would have been specific as to the terms of settlement and indemnity to the settlers; instead, this matter was made the subject of negotiations between the Council and the Polish Government.

[44] *Official Journal,* February, 1924; p. 407.

[45] This amazing effrontery in disregarding the opinion of the Court and in continuing to violate the terms of the Minority Treaty called forth this mild remonstrance from the *rapporteur:*

"This might be interpreted, I fear, as a declaration to the effect that the present contracts of the colonists are not valid." (*Official Journal,* February 1924; p. 407.)

[46] *Official Journal,* February, 1924; p. 360.

the expulsions of the colonists are still continuing. I regard it as extremely important that this state of affairs should be brought to an end without delay." [47]

Upon the receipt of this report, the Council passed the following resolution:[48]

"(1) The Council of the League of Nations considers that the question of the German settlers in Poland can only be settled on the basis of the Advisory Opinion given by the Permanent Court of International Justice on September 10th, 1923, with which the Council is in agreement.

"(2) Since it appears impossible for practical reasons to re-establish in their properties the settlers who have already been expelled, which would be strictly speaking the proper course, those settlers should receive from the Polish Government just compensation for the losses which they have suffered as the result of the fact that they have not been left in undisturbed possession of such properties.

"(3) The Council hopes that the Polish Government may be willing to formulate proposals on the basis indicated above.

"In the meanwhile the Council notes the assurance given by the representative of Poland to the effect that in every case where expulsion has not been carried out prior to the present date the judgments of the Polish tribunals providing for expulsion will not be executed.

"(4) In order to enable the Council to discharge completely its duty towards the persons belonging to the minority in question, it invites its Committee—the representatives of Brazil, Great Britain and Italy—to continue to deal with the matter and to present a further report to the Council at its next meeting."

During the discussion of this resolution, the President of the Council asked the Polish representative if it were not true that a new agrarian bill had been submitted to the Polish Parliament which discriminated against non-Polish farmers and which threatened the rights of 20,000 such farmers. M. Skirmunt admitted that the new bill made a distinction between lands granted to owners for political reasons, (German settlers) and lands belonging to Poles of the Polish race. He stated that he would report to the Polish Government the "uneasiness" of the Council concerning the new measure.

Viscount Cecil pointed out the importance of honoring the opinion of the Court, stating that the whole question of minorities was of very great importance since it affected, so he was informed, some fifty million persons in various states possessing minority treaties, "the general purpose of which was to secure them fair and equal treatment."

The above resolution, however, established the fact that, when settlers are evicted in violation of the Minority Treaty, it is not practicable

[47] *Official Journal,* February, 1924; p. 408. [48] *Ibid.,* p. 360-361.

to re-establish them on their properties but they will receive instead "just compensation" in some manner and form to be determined in the future after they have become refugees. This decision will bring cold comfort to racial groups who have spent generations in building up their homes. The complainants, in submitting the case to the Council, requested that the tenants be given a hearing and that they either retain their leases or be given the right to dispose of their own property. All three requests were denied by the Council—an impossible consequence had the whole question been adjudicated before a properly constituted arbitral tribunal.

The Committee, authorized by the above resolution to carry on negotiations while the evictions continued, met with the Polish representative early in March, 1924, and submitted a report at the March session of the Council. *Fresh observations by the Polish Government led the Committee to re-examine its report.*[49] This procedure, being a repetition of that followed from 1921-23, allowed ample time for Poland to complete the evictions of the remaining third of German settlers.

It is reported that an agreement has been reached between the Council and Poland by which the latter agrees to pay to the evicted settlers 2,700,000 gold francs as compensation for 500 persons (around $540,000).[50] As nearly 3,000 settlers have been evicted the question arises what compensation the other 2,500 will receive?[51] Whether this compensation as determined by a political body approximates that which would have been fixed by the Court had it been permitted to do so, would only be a matter of speculation. But that the Court should have had jurisdiction to determine whether these settlers should not be reinstated instead of compensated; and their claims determined by law instead of by politics, there can be no doubt, if justice is to be regarded as essential to peace. It is part of the hypocrisy of peace that Poland, having rejected the proposal to reinstate these settlers and having retained the land and having continued evictions after the opinion of

[49] *L. of N. Monthly Summary,* April, 1924; p. 62.

[50] *Manchester Guardian Weekly,* June 20th, 1924.

[51] During the time the matter was before the Council Poland expelled colonists from 996 holdings; while the matter was before the Court a second thousand were evicted; and after its opinion was rendered the evictions continued. *(Official Journal,* February, 1924; p. 35.) It is reported that of the 2,781 German settlers originally in question not more than two hundred still hold their settlements. It is also reported that the Germanic League at Bromberg, which made the complaint to the Council in November, 1921, was dissolved by the Polish Government in the fall of 1923, apparently as a protest against the opinion of the Court. *(Deutsche Rundschau,* Bromberg, October 16th, 1923.)

the Court, should be congratulated upon its conciliatory spirit in compensating these settlers to the extent of a few hundred dollars apiece for the loss of their homes. It is not less ironical that Czechoslovakia, having its own troubles with minorities, should have moved the congratulations.

The procedure followed in this case, including the records of Conference, Council and Court, is commended for serious examination to Americans who believe that the system of arbitration, founded at The Hague with their co-operation, is either being preserved or strengthened by the settlement of actual disputes.

II

THE ACQUISITION OF POLISH NATIONALITY

When the provinces of West Prussia and Posen, in which lived the German settlers, were transferred to Poland, provision was made in the Peace Treaty under Article 91 for these settlers to acquire Polish nationality, as follows: (1) German nationals, habitually resident in territories recognized as forming part of Poland were to acquire Polish nationality *ipso facto* losing their German nationality; (2) German nationals or their descendants who became resident after January 1st, 1908, would not acquire Polish nationality without special authorization by the Polish state; (3) within a period of two years after the Treaty came into force, German nationals over eighteen years of age, habitually resident in these territories, were entitled to opt for German nationality, and within twelve months might transfer their place of residence to the country of option; (4) such optants were entitled to retain their immovable property and to carry with them their movable property, without export or import duties. A reciprocal arrangement was made for Polish residents in German territory.

In accordance with these provisions, the Polish Minority Treaty provided the following clauses as guarantees to the minorities which were included within the new state.

Preamble. "Poland, * * * desiring to conform her institutions to the principles of liberty and justice, and to give a sure guarantee to the inhabitants of the territory over which she has assumed sovereignty, * * * agreed as follows: * * *

Article 2. "Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.

"All inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, whose practices are not inconsistent with public order or public morals.

Article 3, Par. 1. "Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality German, Austrian, Hungarian or Russian nationals habitually resident at the date of the coming into force of the present Treaty in territory which is or may be recognised as forming part of Poland, but subject to any provisions in the Treaties of Peace with Germany or Austria respectively relating to persons who became resident in such territory after a specified date.

Article 4, Par. 1. "Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there.

Article 8. "Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals. In particular they shall have an equal right to establish, manage, and control at their own expense charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein."

THE QUESTION BEFORE THE COUNCIL

On November 12th, 1921, the Germanic League of Bromberg laid before the League of Nations a petition, requesting relief from the policies pursued by the Polish Government toward German nationals who had acquired Polish nationality under the foregoing provisions. The allegations held by the petitioners to be in violation of the Minority Treaty, were the following:[52] (1) Article 3 of the Minority Treaty assures complete equality before the law; election regulations demand that all candidates for municipal bodies must speak and write Polish, and German candidates are given a special examination; the residents maintain it is impossible in the short time of two years to learn Polish particularly in districts where the majority are German. (2) Article 8 grants the same treatment and the same legal and real guarantees to minorities as to other Polish citizens, but the agrarian law of July 14th, 1920, is applied against German leaseholders, and those desiring to acquire land. (3) Article 99 of the Polish Constitution declares that dispossession can take place only against complete compensation, but the dispossessed settlers are being paid less than this compensation. (4) Article 8 of the Minorities Treaty assures freedom of education and cultural preferences, but German Lutheran communities are being deprived of their school estates and buildings. School principals are refused the right to use buildings constructed at

[52] *P. C. of I. J., Series C, No. 3,* Vol. III, Part I; pp. 48-63.

their own expense for an all-German private school. (5) Article 8 also affords to minorities the right to organize, manage and supervise the social and religious institutions, free use of native language and free religious exercise. Many of the church estates, cemeteries, parish gardens, farms and lots used by the Protestant church were, under the pretext of the law of July 14th, 1920, withdrawn from the use of the community or turned over to the Catholic priests. German inscriptions on church buildings have been removed, and church papers are ordered printed in Polish although the parishioners generally do not understand that language. The resolutions of the Synod are declared invalid and the Polish Government claims the privilege of appointing in the provincial synods emissaries with the right to interfere and enter motions; also it claims the right to appoint the president and members of the Protestant Consistory. (6) Article 91 of the Peace Treaty guarantees the right of option and safeguarding of property in that event. This right is denied to those establishing their residence after January 1st, 1908, while in every case half of the movable property of optants is retained by the Polish Government.

The petitioners also alleged in their complaint that the Polish Government was interpreting the Peace Treaty and the Minority Treaty in a manner contradictory to the spirit and language of these instruments. In a report, submitted to the Council on May 17, 1922, a Special Committee of the Council (M. Hymans, Marquis Imperiali and M. Adatci) summarized the situation as follows:[53]

"(1) Article 3 of the Minorities Treaty lays down that German nationals habitually resident, at the date of the coming into force of that Treaty, in Polish territory shall be recognised as Polish nationals, but subject to any provisions in the Treaty of Peace with Germany relating to persons who become resident in such territory after a specified date. The provision in question in the Treaty of Versailles is contained in Article 91, which lays down that German nationals or their descendants who have taken up their residence in Polish territory since January 1st, 1908, may only acquire Polish nationality by special permission of the Polish State.

"The petitioners complain that the Polish Government insists that there must have been continuous and actual personal residence from 1908 to 1920. Any absence whatever would, according to the practice of the Police Administration, constitute an interruption barring the acquisition of Polish nationality.

"(2) The provision contained in Article 3, laying down that habitual residence in Polish territory at the date of the coming into force of the Treaty is necessary, is interpreted by the Poles to mean that actual presence was necessary on January 10th, 1920, while the petitioners are of

[53] *Official Journal*, June, 1922; p. 706.

opinion that 'habitual residence' implies that the main interests of the persons concerned were in Polish territory at the date of the coming into force of the Treaty.

"(3) The Polish Government does not recognise the principle of 'dual domicile.' Many Germans hold estates on both sides of the new boundary and sometimes stay on one, sometimes on the other. They are now refused Polish nationality by the Polish Government.

"(4) Article 4 of the Minorities Treaty recognises as Polish nationals persons of German nationality who were born in Polish territory of parents habitually resident there, even if, at the date of the coming into force of the Treaty, they were not themselves habitually resident there.

"In view of the petitioners, the only reasonable interpretation of this provision is that the parents of the person born in this territory must have been domiciled there at the time of his birth, but the Polish Government claims that the parents must have been habitually resident there on January 10th, 1920. The interpretation adopted by the Polish Government has the effect of preventing even a person seventy years of age, who has passed his whole life in the territory in question, from acquiring Polish nationality if his parents are dead and unless he was habitually resident there on January 10th, 1920.

"(5) The petitioners further raise the question of the unity of the family, and claim that persons who inherit estates in Poland, which have long been in the possession of their family, should have the right to become Polish citizens even if they do not satisfy the conditions laid down in the treaties regarding the acquisition of Polish nationality."

This report was adopted, and a copy sent to the Polish Government with the request to forward to the Council detailed information upon the questions of fact and law.[54] Negotiations were opened between the Secretariat and the Polish delegation during which time the Polish Government forwarded considerable information. The net result, however, was that the Polish Government contended that the interpretation of Article 4 was not within the competence of the League, inasmuch as it was not placed under the League's guarantee. Thereupon, the question was submitted to the Committee of Jurists which had examined the matter of the Polish settlers;[55] the Committee held that Article 4 was placed under the guarantee of the League of Nations. The Committee also rendered an opinion, concerning the question whether paragraph 1 of Article 4 referred to the domicile of the parents at the time when an individual was born, or when the Treaty comes into force. The Committee said:[56]

[54] The question of the acquisition of Polish nationality was included in the resolution of May 17th, 1922. (See p. 572.)

[55] See p. 573.

[56] *Official Journal,* November, 1922; p. 1300.

"The text attributes Polish nationality according to birth and the conditions of that birth, i.e., birth upon the territory, or birth of domiciled parents. The domicile of the parents at the time of the coming into force of the Treaty should not constitute a condition of birth and qualify this birth retrospectively. If the Treaty requires the domicile of the parents, it is in order to ensure that it shall not apply to an individual born by chance upon the territory, but to an individual born of parents who have some connection with the territory. Moreover, the supposition, in a sentence immediately following, of a fact as existing at the date of the coming into force of the Treaty shows clearly that in the preceding sentence of the text it is not that moment which is referred to."

The report of the Special Committee containing these findings was adopted by the Council at a session held on September 30th, 1922. On December 9th, 1922, the Polish Minister of Foreign Affairs stated the objections of the Polish Government to the conclusions of the Committee of Jurists as follows:[57]

"As regards the interpretation of Article 4 of the Treaty of June 28th, 1919, the Polish Government cannot alter its interpretation of that article so long as the Germans give evidence of a tendency to avail themselves of it for a totally different purpose from that of assuring individual interests. Moreover, in the view of the Polish Government, Article 4 is not one of those placed under guarantee of the League of Nations, and, further, the representative of Poland has just informed the Secretary-General that the question of the interpretation of this article is at present the subject of negotiations between the delegations of the German and Polish Governments at Dresden and that, in these circumstances, it would seem that this question should be removed from those dealt with in the opinion given by the above-mentioned jurists."

In view of the attitude of the Polish Government the question was adjourned to await the result of the negotiations which were in progress between the Polish and German Governments. On July 4th, 1923, the question was discussed and again adjourned by reason of the fact that on June 26th, the Polish Government had informed the Secretary-General that these negotiations were succeeding. At a meeting of the Council, held on July 7th, 1923, the Polish representative notified the Council that negotiations with Germany were not proceeding as rapidly as he had believed, and he withdrew that ground of objection. But he immediately introduced a new objection, namely, that since the Article in the Minority Treaty with Poland had been textually reproduced in other Minority Treaties, other countries signatory to similar treaties were concerned, and these states (Czechoslovakia, Roumania and Jugo-Slavia) should be consulted. This further attempt to obstruct a judi-

[57] *Official Journal,* March, 1923; p. 396.

cial determination of the issue was not well received; for the Council passed a resolution on July 7th, 1923, as follows:[58]

"The Council of the League of Nations having received notice of the following question:

"The Polish Government has decided to treat certain persons, who were formerly German nationals, as not having acquired Polish nationality and as continuing to possess German nationality, which exposes them in Poland to the treatment laid down for persons of non-Polish nationality, and, in particular, of German nationality:

"On the one hand, on the ground that these persons were born in the territory which is now part of Poland, their parents having been habitually resident there at the date of their birth, it is maintained that in virtue of Article 4, paragraph 1 of the Treaty of June 28th, 1919, between the Principal Allied and Associated Powers and Poland, they are *ipso facto* Polish nationals and, consequently, enjoy all the rights and guarantees granted by the provisions of the said Treaty to Polish nationals belonging to racial, religious or linguistic minorities:

"On the other hand, the Polish Government considers itself entitled not to recognise these persons as Polish nationals, if their parents were not habitually resident in the above-mentioned territory, both on the date of birth of the person concerned and on the date of the entry into force of the above-mentioned Treaty, namely, January 10th, 1920. It is, consequently, maintained that these persons cannot legally enjoy the guarantees granted by the Treaty.

"Requests the Permanent Court of International Justice to give its advisory opinion, if possible during the present session, on the following questions:

"(1) Does the question regarding the position of the above-mentioned persons, in so far as they may belong to racial or linguistic minorities arising out of the application by Poland of Article 4 of the Treaty of June 28th, 1919, between the Principal Allied and Associated Powers and Poland, fall within the competence of the League of Nations under the terms of the said Treaty?

"(2) If so, does Article 4 of the above-mentioned Treaty refer solely to the habitual residence of the parents at the date of birth of the persons concerned, or does it also require the parents to have been habitually resident at the moment when the Treaty came into force?

"The Secretary-General is authorised to submit this request to the Court, together with all documents concerning the question, to inform the Court of the action taken by the Council in the matter, to give all necessary assistance in the examination of the case, and, if necessary, to arrange to be represented at the Court."

OPINION OF THE COURT

The request for an advisory opinion was made to the Court on July 11th, 1923. On August 25th, 1923, Roumania notified the Court

[58] *Official Journal,* August, 1923; p. 999.

that it desired to be heard; but it was not heard, as the Court did not extend the time necessary for its representative to appear. In rendering its opinion on September 15th, 1923, the Court said:[59]

"The Court's task is clearly defined. Having before it a clause which leaves little to be desired in the nature of clearness, it is bound to apply this clause as it stands, without considering whether other provisions might with advantage have been added to or substituted for it. The Minorities Treaty (Art. 4, paragraph 1) admits and declares to be Polish nationals, *ipso facto,* persons who were born in the territory of the new State 'of parents habitually resident there.' These words refer to residence of the parents at the time of the birth of the child and at this time only. It is necessary, but on the other hand sufficient, that on the date of birth the parents should have been habitually resident, that is to say should have been established in a permanent manner, with the intention of remaining, in the territory which subsequently became incorporated in Poland. To impose an additional condition for the acquisition of Polish nationality, a condition not provided for in the Treaty of June 28th, 1919, would be equivalent, not to interpreting the Treaty, but to reconstructing it. * * *

"The Court is of opinion that the position of the persons contemplated in the Resolution of the Council of the League of Nations of July 7th, 1923, arising out of the application by Poland of Article 4 of the Treaty of June 28th, 1919, between the Principal Allied and Associated Powers and Poland does fall within the competence of the League of Nations under the terms of the said Treaty;

"That Article 4 of the above-mentioned Treaty does refer only to the habitual residence of the parents at the date of birth of the persons concerned."

THE QUESTION RETURNS TO THE COUNCIL

The opinion of the Court establishing the competence of the League and interpreting the Treaty contrary to the Polish view created practical difficulties in applying the legal principle, enunciated by the Court. The property of a number of persons, who had been refused Polish nationality in accordance with the Polish interpretation of Article 4, had been liquidated and they had left the country. These were not to be regarded as Polish nationals with the rights of such. Among the questions created by the controversy may be noted the following, as illustrative of the practical difficulties of applying an advisory opinion where the Court is restricted to giving advice upon one aspect of the question:[60]

"(1) (a) Is a person to be considered domiciled in a place if he resides there permanently? (b) Can a person establish or retain his

[59] *P. C. of I. J., Series B, No. 7;* p. 20.
[60] *Official Journal,* November, 1923; p. 1495.

domicile in a given place if he is in possession of, or if he acquires, a domicile elsewhere? (c) Can an existing domicile be abandoned by any other means than that of leaving the residence with intent to abandon? (d) Can a minor acquire or surrender a domicile with the consent of his legal representative? (e) Can a given person possess a 'legal domicile' and a 'voluntary domicile' at the same time?

"(2) Must the domicile specified in Article 3 exist in the territory ceded by Germany, or is it sufficient if it be situated in the territory definitely recognised as forming part of Poland?

"(3) Is it sufficient if the domicile was established there before January 2nd, 1908, and still existed there at the time of cession, or is an uninterrupted domicile essential?

"(4) Is it sufficient if the domicile was established before January 2nd, 1908, or must it have existed on that date?

"(5) Is it sufficient if the person who was a German national on the date of cession and was domiciled there on that date possessed his domicile there before January 2nd, 1908, irrespective of his nationality at that time, or was it necessary for him to have acquired German nationality before that date?

"(6) Do persons one or both of whose parents have died acquire Polish nationality if they were domiciled in the territory in question before January 2nd, 1908, and on the date of cession?

"(7) Do widows who were domiciled in the territory in question before January 2nd, 1908, and on the date of cession, acquire Polish nationality even if their husbands have died before the date of cession?

"(8) Must persons of German descent who have exercised their right of option remove their domicile to Germany, or are they entitled to remain in Poland under the conditions laid down by International Law concerning aliens who have settled in a particular country?

"(9) Do persons born in Poland acquire Polish nationality by virtue of Article 4 if their parents were domiciled there on the date of birth, or is the domicile of the parents on the date of cession required?

"(10) Is it sufficient for the persons concerned to have been born in territory definitely assigned to Poland, or must they have been born in the territory ceded by Germany?

"(11) Are persons of German descent who have been unable to exercise their right of option in complete freedom, in conformity with Article 5, entitled to withdraw their declaration of option?"

On September 27th, 1923, the Council passed a resolution in which it adopted the opinion of the Court, took note of the report submitted by Viscount Cecil, and concluded as follows: [61]

"The Council * * * invites the *Rapporteur*, who for this purpose might be assisted by the competent services of the Secretariat, to offer his *bona officia* to the Polish Government:

"(a) For further examination of the question of the application of the Polish nationality clauses;

[61] *Official Journal*, November, 1923; p. 1334.

"(b) For such negotiations as the Polish Government might desire to enter into with the German Government on the same subject;

"Invites the *Rapporteur* to submit to the Council for its next session a report on the situation of the different questions dealt with in the present resolution."

On December 15th, 1923, the *rapporteur,* M. de Sousa Dantas (Brazil) reported progress in bringing the two countries into negotiation to settle the outstanding questions.[62] These negotiations were opened on February 12th, 1924, under the direction of the *rapporteur.* At the session of the Council held in March, he reported that no practical solution of the legal questions had been found and he had in mind seeking the further opinion of the Court. With this course the Council was not in sympathy, as it believed reference of these questions to the Court would involve a certain delay. It recommended, therefore, that the Polish and German delegations continue their deliberations, and if no agreement was reached by April, that the President of the Upper Silesian Arbitral Tribunal be requested to preside over the deliberations as mediator. Should not the points under discussion result in a complete agreement in the form of a signed convention by June 1st, 1924, the mediator was to be empowered to mediate upon all points still at issue.[63]

In this manner the Court was set aside and the legal questions which were raised by its own opinion were referred to a mediator appointed by the Council.

COMMENTARY

The Council consumed a period of nineteen months in the discussion of this question in order to formulate the submission of the question to the Court. Lord Finlay, a member of the Court, pointed out the futility of this preliminary preparation when he said: "The question for the Court is defined by the Treaty of Minorities itself, by its second article, wherein 'Poland engages to grant to all the inhabitants full and complete protection of life and liberty without distinction of birth, nationality, language, race or religion.'"[64] But instead of remedying the wrong complained of by the petitioners, the time was consumed in determining the competence of the League. Had any one of the Allied Powers, signatory to the Treaty, acted upon the petition to bring the question before the Court, the rights of the League would not have obscured the grievances and sufferings of the residents.

[62] *Official Journal,* February, 1924; p. 405.
[63] *L. of N. Monthly Summary,* April 1924; p. 62.
[64] *P. C. of I. J., Series B, No. 7;* p. 24.

But the disinclination of the Council to refer to the Court the legal questions, arising from its own opinion on the ground of alleged delay, appears to have sacrificed justice. The Council has not hesitated to request an extraordinary session of the Court when the interests of the Allied Powers have been involved; and now to plead delay by the Court is open to the inference that it was an excuse for retaining the terms of settlement within the political power of the Council.

The arbitration of this opinion, as now being interpreted by the Council, would have an analogy in the United States, were a decision of the United States Supreme Court to be referred to a justice of the peace for an interpretation, such being the relative competence of the Court of Justice and of the mediator with whom a final decision rests.

CHAPTER XXXI

THE POLISH-CZECHOSLOVAK FRONTIER

Jaworzina, the subject of this controversy, is a small commune, situated, at the altitude of about 1,000 meters, on the northern slope of the highest range of the Carpathian Mountains, called the "Tatra," in the district of Spisz, a short distance from Zakopane, the Polish summer resort, famous for its beauty. The district of Jaworzina is a valley about twenty-five kilometers long and eight wide, following the River Bialka and sloping from south to north. The southern end of the district rises to a pass of great strategic value, since it is one of the few connections between the northern and southern slopes of the Carpathians. The region is also said to contain copper and silver mines, which have, however, not been worked for centuries.

As a result of the war and the breaking up of the Austro-Hungarian Empire, the Principal Allied Powers represented in the Supreme Council were entrusted with the task of delimiting the frontiers of the new states of Poland and Czechoslovakia as provided in Articles 81 and 87 of the Versailles Treaty, Article 91 of the Treaty of St. Germain and Article 75 of the Treaty of the Trianon.

This task involved the disposal of three territories on the Galician-Hungarian frontier which were claimed by both Poland and Czechoslovakia. These territories were the districts of Teschen, Orava and Spisz. Poland claimed them on ethnic and historic grounds, while the Czechoslovak claims were economic. It appears that the latter occupied the districts in November, 1918, but the Galician Poles carried on an active propaganda, and on January 10th, 1919, the Warsaw Government established an Administrative Commission at Cracow which included this district.[1] These rival claims led to unrest and disorder which challenged the attention of the Allied Powers. The struggle between Warsaw and Prague for leadership in this section of Europe exaggerated what appeared to be a minor dispute.

The Supreme Council took its first decision on September 27th, 1919, when it determined to hold a plebiscite in order that the people might determine the sovereignty under which they desired to live. A plebiscite commission was sent into the territory for this purpose. The feeling between Poland and Czechoslovakia was such that the plebiscite

[1] Chap. XVIII.

was suspended; yet the dispute continued, and on July 10th, 1920, the Polish and Czechoslovak delegates signed a declaration, in which they agreed to accept a final settlement by the Supreme Council.

On July 11th, 1920, at Spa, the Supreme Council adopted a resolution which laid down certain indications to be communicated confidentially by each of the Allied Powers, represented on the Supreme Council, to their representatives on the Conference of Ambassadors. This body was authorized to hear the two parties and then to "elaborate with the least possible delay a decision in accordance with the instructions of the Supreme Council." [2] After indicating the boundaries, the resolution concluded: [3]

"The Conference of Ambassadors shall take such measures in consultation with the representatives of the Republic of Czechoslovakia and Poland as will ensure the satisfactory settlement of all economic questions including that of the distribution of coal and of transport, between the two countries."

In conformity with these instructions, the Conference of Ambassadors, on July 28th, 1920, adopted a decision, embodied in a resolution which formed the basis of the subsequent dispute.[4] Article 1 defined the territory of the three districts and established the sovereignty of the respective states. Article 2 appointed a Delimitation Commission composed of one representative of each of the Principal Allied Powers and of Poland and Czechoslovakia to mark out on the spot the frontier line as laid down. The decision of the Commission was to be binding and was to be determined by a majority vote; in the event of an equal division the President was to make the decision. The Commission was empowered to propose to the Conference any modifications which it considered "justified by reason of the interests of individuals or of communities in the neighborhood of the frontier line and having regard to settled local circumstances."

This resolution was signed by representatives of the Allied Powers and by Dr. Benes for Czechoslovakia and by M. Paderewski for Poland. But on July 30th, 1920, the latter drew the attention of the Conference to the fact that the resolution was not in accordance with the principles of nationality established by the Peace Conference nor in accordance with Point 13 of the Fourteen Points, inasmuch as in the districts of Spisz and Orava 25,000 Poles were left in the district awarded to Poland, while 45,000 were in the territory given to Czechoslovakia.[5]

[2] *P. C. of I. J., Series C, No. 4;* p. 126. [3] *Ibid.,* p. 127. [4] *Ibid.,* pp. 128-136. [5] *Ibid.,* p. 138-140. (In French.)

On August 10th, 1920, a so-called Frontiers Treaty was concluded at Sèvres with Poland and with Czechoslovakia, determining the disputed frontiers of these two states. This Treaty was, however, not ratified and did not come into effect. Accordingly, the Allied Powers proceeded with the delimitation of the Spisz frontiers, in accordance with the resolution of July 28th, 1920, and under Article II of this resolution issued instructions to the Delimitation Commission. The instructions confirmed the decision of July 28th, 1920, in that they empowered the Delimitation Commission to propose modifications on request of either interested state, on any section of the boundary with exception of the former Austro-Hungarian frontier existing in 1914. The Commission was requested to follow as closely as possible the definitions given in the Treaty, "having regard wherever possible to administrative boundaries and local economic interests, to the exclusion of national, linguistic and religious considerations." [6]

The Delimitation Commission began its work, and at its meeting on April 23rd, 1921, was able to adopt unanimously certain proposals with regard to the frontier line in Teschen and Orava. These modifications were approved by the Conference on May 25th, 1921.[7] At that meeting the Polish member of the Commission read the following declaration: [8]

"The Polish Delegation has voted in favor of the Commission's proposal on condition that the same conciliatory spirit will prevail in discussions upon the third sector of the frontier, where Poland confidently hopes to obtain by means of an exchange her natural frontier at Jaworzina, a commune upon which depends the economic existence of five communes of Spisz allocated to Poland."

To this declaration, the President of the Commission replied that he hoped the conciliatory spirit would prevail on the question of Spisz; but that question could not be discussed until the Commission had made its investigation. The conciliatory spirit, however, did not prevail and on July 5th, 1921, the Commission reported to the Conference that it was unable to make a recommendation, owing to the wide divergence of views between the Polish and Czech members of the Commission. The Allied Commissioners were unanimously of the opinion that, from the purely economic point of view, the Polish contentions were justified on certain grounds and would be of advantage to the neighboring villages; but they stated that "considerations of a military and

[6] *P. C. of I. J., Series B, No. 8;* p. 41.
[7] Chap. XVIII.
[8] *Publications, P. C. of I. J., Series B, No. 8;* p. 52.

political nature seem to be regarded by the parties concerned as of greater interest than the economic considerations put forward by either side and that the true object of the dispute is in reality the possession of the northern slope of the eastern part of the Tatra, which was given to the Czechoslovak state by the decision of the Conference of Ambassadors of July 28th, 1920." [9] Thereupon the Delimitation Commission confessed its impotence as follows: [10]

"In these circumstances, having regard in the first place to the considerable nature of the modifications proposed by Poland, and in the second place to the relative importance of the economic arguments adduced, which have to be considered in conjunction with the military and political interests involved, the Allied Commissioners consider that the modifications claimed are outside the scope of the discretion left them under Article II of the decision of July 28th and Chapter I of the Instructions for Delimitation Commissioners."

The proposals made by the delegates of the contending states were annexed to this report, but without any recommended modifications by the Delimitation Commission, leaving the Conference of Ambassadors to make the choice.[11]

The choice made by the Conference was to leave the matter temporarily to the two states. In an agreement of good will signed at Prague on November 6th, 1921, the two Governments undertook to reach an agreement within six months. Thereupon the Conference on December 2nd, 1921, suspended the execution of the decision of July 28th, 1920, to enable Poland and Czechoslovakia to conclude an agreement which would go beyond the terms of Article 2 of that decision. In other words, by agreement, the two states could make modifications which the Conference would accept from them, but which it would not accept from its Delimitation Commission. It made a condition, however, namely, that "no modification can be made in the frontier line as defined by the decision of July 28th, failing the conclusion of a friendly agreement between the interested parties." [12]

On request, the time was extended by the Conference from January 15th until August 16th, 1922. On September 12th the negotiations between the two states having failed to produce an agreement, the

[9] *P. C. of I. J., Series B, No. 8;* p. 44. [10] *Ibid.,* p. 45.

[11] Among the observations of the Commission, it is interesting to note one concerning the wishes of the population: "The representatives heard by the Allied Commission declared in general that they were indifferent as to whether they should become Czecho-Slovaks or Poles as long as their villages were not separated from their grazing grounds." *(P. C. of I. J., Series C, No. 4;* p. 183; in French.)

[12] *P. C. of I. J., Series C, No. 4;* p. 198.

Allied members of the Delimitation Commission proposed a line of demarkation considerably more favorable to Poland than the line laid down on July 28th, 1920. While reducing the extent of territory claimed by the Poles, it satisfied the economic interests of the communes near the frontier. From the military standpoint, Czechoslovakia was favored, retaining the important crest line of the Tatra. On September 25th, 1922, the Delimitation Commission announced that the Polish and Czech members of the Commission had requested the Commission to proceed without delay and that in a vote taken by the Commission, the frontier above described had received five votes out of six.[13]

On November 13th, 1922, the Conference of Ambassadors, acting on the recommendation of its drafting committee, of whom M. Fromageot (France) was chairman, refused to accept this solution without further investigation. The communication to the Delimitation Commission [14] stated that the Conference, in its note of December 6th, 1921, had suspended its decision of July 28th, 1920, only on condition that the parties reached an agreement. Since no such agreement had been reached, the Conference retained its rights and the Delimitation Commission had exceeded its powers in marking out a frontier. The Conference would, therefore, strictly apply its decision of July 28th, 1920, and would resume all its rights with relation to Spisz.[15] On April 26th, 1923, the Polish Government drew the attention of the Conference to the fact that it had made no final decision regarding the frontiers of Jaworzina and that a state of unrest and agitation existed in this district; [16] and, therefore, it requested the Conference to make a decision.[17] No agreement was possible, and on July 27th, that body decided to refer the matter to the Council of the League of Nations. A communication to this effect reached the Council a month later, on August 31st, 1923.

It will be observed with what procrastination political adjustments move. The Treaties of 1918 conferred upon the Supreme Council authority to delimit the boundary line in question. Instead of proceeding directly about this business, on September 27th, 1919, that body temporized with a plebiscite; on July 10th, 1920, the plebiscite

[13] *P. C. of I. J., Series C, No. 4;* pp. 243-44.
[14] *Ibid.*, pp. 247-49.
[15] *Ibid.*, p. 247.
[16] *Ibid.*, pp. 260-63.
[17] For similar methods of procrastination by the Conference, see Chap. VIII; p. 41 concerning Albania; and Chap. XVII, p. 332, concerning Eastern Galicia; Chap. XI, p. 246, concerning Lithuania; and Chap. XII, p. 264, concerning Memel. In all of these states warfare in some degree took place owing to delays in a final settlement.

was suspended and Czechoslovakia and Poland agreed to accept the Supreme Council's decision. On July 11th, the Supreme Council referred the matter to the Conference of Ambassadors; on July 28th, 1920, that body adopted a line of demarkation and authorized a Delimitation Commission to fix the line on the spot; on July 30th, the Polish representative hoisted storm signals; on August 10th, the Frontiers Treaty of Sèvres gave Jaworzina to Czechoslovakia, which occupied it; on April 21st, 1921, the Delimitation Commission effected an agreement on Teschen and Orava; on July 5th, 1921, after encountering numerous obstacles, the Delimitation Commission reported its incompetence to make a recommendation as to Spisz; on December 2nd, the Conference sent an ultimatum to the parties to agree by January 15th, 1922; and later the time was extended to August 6th, 1922. On September 12th, the Allied members of the Delimitation Commission reported a compromise; on November 22nd, the Conference rejected it, and on July 27th, 1923, confessed its own inability to agree and sent the question to the Council. Thus ended four years of delay over settling the question of Jaworzina.

THE REASONS FOR THE DELAY

Czechoslovakia and Poland, each having in mind a possible future war, coveted the mountain ridge and the pass. Czechoslovakia occupied and intended to keep it. This strife for a military advantage created a legal dispute which kept the victorious Powers who were the creators of these new states occupied for the better part of four years. The legal dispute was this: Poland contended that the decision of the Conference of July 28th, 1920, was not final, but was open to modifications to be proposed by the Delimitation Commission, that the Conference could not deprive the Commission of the rights that it had once given, that the Czechoslovak member of the Commission voted with the Commission in its recommendation of September 25th, 1922 (repudiated by the Conference), and Czechoslovakia was, therefore, bound by the recommendation which a majority of the Commission had made. On the other hand, Czechoslovakia contended that the decision of July 28th, 1920, was final except for slight modifications to be made by the Delimitation Commission; that the Conference agreed to accept substantial modifications only when the two contesting states reached an agreement, otherwise, the Conference would proceed to put into effect the decision reached on July 28th, 1920; that they did not reach an agreement and the Conference rejected the proposals of the Delimitation Commission which were in conflict with the Conference's deci-

sion; and that the Conference had not the power to revoke its previous decision.

THE QUESTION BEFORE THE COUNCIL

As there were in the Conference members who supported both views, the question was referred to the Council of the League in a communication, reading, in part, as follows:[18]

"The said Governments have decided, by application of Article XI, paragraph 2 of the Covenant of the League of Nations, to lay these difficulties before the Council of the League and to request it to be good enough to inform the Conference of the solution which it recommends as regards the delimitation of the frontier line in question.

"The Council of the League of Nations shall be requested to consider this matter as of great urgency.

"The said Governments would have no objection should the Council desire to ask the opinion of the Court of International Justice on the legal question already mentioned which is raised by these difficulties.

"II. The foregoing decision shall be communicated to the Polish and Czechoslovak Governments."

This procedure, however, appears not to have been satisfactory to the Polish Government, for on August 21st, 1923, it sent a communication to the Conference of Ambassadors in which it expressed regret that the matter had been referred to the Council, on the ground that such procedure would lead to further delay and that the Conference was fully competent to decide the matter. The Czechoslovak Government addressed a communication to the League of Nations on September 11th, 1923, urging that the legal questions be referred to the Court without further delay.

The Council referred the matter to M. Quinones de Leon (Spain) *rapporteur*. In conference with representatives of the two governments concerned, an agreement was reached that the Council should request an advisory opinion, and the question was formulated as follows: [19]

"Is the question of the delimitation of the frontier between Poland and Czechoslovakia still open, and if so, to what extent; or should it be considered as already settled by a final decision, subject to the customary procedure of marking boundaries locally with any modifications of detail which that procedure may entail?"

On September 27th, 1923, the Council adopted a resolution embodying the question as stated; also exact statements of the case by each of the representatives of the two governments, which were transmitted to the Court.[20]

[18] *Official Journal,* November, 1923; p. 1472. [19] *Ibid.,* p. 1332.
[20] *Ibid.,* p. 1474.

It will be observed that only part of the dispute was sent to the Court, namely, whether the question was open or closed, while the question of whether the Delimitation Commission had exceeded its authority was reserved by the Council. The Court was called in extraordinary session on November 13th, 1923.

QUESTIONS BEFORE THE COURT

The Court took into consideration four questions: The first being: What is the nature and effect of the decision of July 28th, 1920? On this point, the Court held that this decision was a final solution in that it was at once the fulfillment of a resolution of the Principal Allied Powers and of an agreement between the interested parties and had been taken with a common desire on the part of all concerned to arrive at a final settlement. The Court held further that the letter from the Polish Government dated July 30th, 1920, regretting the decision taken by the Conference, might possess historical value, but could not be given weight in view of the joint declaration entered into by the two governments wherein the duly authorized representatives of the Polish and Czechoslovakia Governments, in accordance with their Declaration of July 10th, 1920, accepted on July 28th, 1920, on behalf of their respective Governments, the provisions set out above.[21] The Court held that this agreement, together with the one entered into on July 10th, 1920, gave to the decision the force of a contractual obligation and therefore the question of a revision of the decision could not be raised.

The second question was: What is the frontier line, as defined by this decision, in the Spisz district? The Court held that the Conference was requested to divide the Spisz territory which, defined by the Resolution of the Supreme Council, on September 27th, 1919, had constituted a clearly defined district; that the Frontiers Treaty of Sèvres of August 10th, 1920, was contemporary with the decision of the Conference of July 28th, 1920, and emanated from the same Powers; and that the Treaty specified that the frontier line was to be formed by the old frontier between Hungary and Galicia except where the decision of July 28th departed from it. Therefore, the frontier was fixed in a definitive manner for the whole region of Spisz by the decision of July 28th, 1920.

The third question was: May the modifications of a frontier, permitted under Article 2 of the decision of July 28th, apply to the

[21] *P. C. of I. J., Series B, No. 8;* p. 30.

whole of the frontier between the two states in the Spisz district including the old frontier between Hungary and Galicia or only to the new dividing line described in the decision of July 28th, 1920? The Court was of the opinion that it applied only to the latter, for that frontier did not exist prior to July 28th, 1920, while the others had long been in existence. The others constituted international and administrative boundaries. In this respect the Court differed from the recommendations made by the Delimitation Commission. The Court, however, stated: [22]

"Nevertheless the Court feels obliged to point out that the Czechoslovak Government, whilst maintaining its standpoint that the right to make modifications under paragraph 3 of Article II of the Decision of July 28th 1920, only extends to the dividing line described in the decision, has admitted in its legal memorandum that a modification of those portions of the frontier line formed by the old frontier between Galicia and Hungary might take place as a result of a modification of the line topographically described in the decision of July 28th, 1920, that is to say as a result of a modification affecting the points where this line begins or ends."

The fourth question was whether the declaration made by the Polish Government on April 23rd, 1921, in relation to the delimitation effected for Teschen and Orava might influence the solution to be adopted in the Spisz territory. The Court held that this declaration had no legal value, but was a mere expectation, as the Commission could only make recommendations which, when adopted by the Conference, were binding on the parties; the interested parties were not in a position to make conditions, and while they might have a moral value, they were not legally binding.

Having disposed of these four questions, the Court, on December 6th, 1923, rendered an opinion as follows: [23]

"that the question of the delimitation of the frontier between Poland and Czechoslovakia has been settled by the decision of the Conference of Ambassadors of July 28th, 1920, which is definitive,

"but that this decision must be applied in its entirety, and that consequently that portion of the frontier in the region of Spisz topographically described therein remains subject (apart from the modifications of detail which the customary procedure of marking boundaries locally may entail) to the modifications provided for under paragraph 3 of Article II of the same decision."

THE QUESTION RETURNS TO THE COUNCIL

In submitting the matter to the Court, the Council withheld one aspect of the question which appeared to be a part of the legal contro-

[22] *P. C. of I. J., Series B, No. 8;* p. 43. [23] *Ibid.*, p. 57.

versy, but over which the Council desired to retain jurisdiction. This was the question whether the Delimitation Commission had exceeded the authority conferred upon it by the Conference in the recommendations it made on September 25th, 1922. The Court, however, in determining the precise question submitted to it, took into consideration this fact and stated that the Delimitation Commission should have a certain degree of liberty in the direction laid down, having regard to topographical features, but that the powers of the Commission were not limited to modifications of this kind and that it might propose more important modifications. On this point the Court said:[24]

"From one point of view this power is fairly wide; for it is not subject to any definite limitation ('the Commission shall be empowered to propose any modifications'); nothing is said as regards the time at which such proposals may be made and there appears to be nothing to prevent their being made more than once. Since the object of this clause is one of equity, it must not be interpreted in too rigid a manner."

On the other hand the Court pointed out that the Commission could only make proposals and the Conference might reject these; they were also limited by the interests of the individuals or communes in the neighborhood of the frontier line, and had to have regard to special local circumstances; and any diversion from the original line must be in the nature of a modification. The Court also stated that the general instructions given to the Commission could neither extend nor reduce their powers, as defined under Article 2 of the decision of July 28th, 1920.[25]

It will be recalled that in the note submitting the question, the Conference requested the Council to make a recommendation. The Council therefore referred the opinion of the Court to M. Quinones de Leon (Spain). He presented a report to the Council at its session on December 13th, 1923, in which he stated that the Court accorded to the Delimitation Commission the right to propose certain modifications in that part of the frontier open to modification by the decision of July 28th, 1920. These recommendations, the report stated, did not form a part of the opinion of the Court, not having been submitted by the Council. Therefore it remained for the Council to answer the question whether the recommendations were in conformity with the decision of the Conference of July 28th, 1920. The representative of Poland requested that the Council should approve of the recommendations of this Commission, as being in consonance with the opinion of the

[24] *P. C. of I. J., Series B, No. 8;* p. 39.
[25] *Ibid.*, p. 40.

Court and with Article II. The representative of Czechoslovakia contended that these proposals were not modifications of the decisions, but an abandonment of them and that the Commission had exceeded its competence.

This difference of opinion delayed a decision, but on December 17th, 1923, M. Quinones de Leon presented a draft resolution in which the Council reached the conclusion that the Commission's proposals were based upon considerations relating to individuals or communities in the neighborhood of the frontier line, but from a legal point of view it had exceeded its powers, in that the recommendations affected the two sectors which were outside the scope of the Commissions' operations. The resolution concluded as follows:[26]

"The Council therefore requests the Governments represented on the Conference of Ambassadors to be so good as to invite the Delimitation Commission to furnish fresh proposals in conformity with the opinion of the Court and with the results of the Council's deliberations, without prejudice to any changes or arrangements which may be freely agreed to by the Governments concerned.

"The Council is anxious to carry out the task entrusted to it by the Governments represented on the Conference of Ambassadors, namely, to put before them the solution which it recommends for the tracing of the frontier-line in question, and therefore hopes that it will be able to take cognisance of the Commission's proposals before its coming session, which will open on March 10th next."

To this resolution, the representative of Poland objected on the ground that it did not take into account the legal statement made by Czechoslovakia that changes in this sector might have to be made; and that the Polish concessions made in Orava should be borne in mind. He pointed out that the report emphasized all of the passages of the opinion of the Court which tended to restrict the powers of the Delimitation Commission; and passed over in silence all of the powers which attributed to it a wide discretion. Whereupon the report was amended by including a reference to the legal statement made by the representative of Czechoslovakia[27] and in this form the report was adopted.

THE RECOMMENDATION OF THE COUNCIL

The Delimitation Commission, in accordance with the recommendation of the Council and at the request of the Conference of Ambassadors, traced a new frontier line, which was submitted to the Council at its meeting on March 12th. The line was accepted by the Council, and that body made an additional recommendation that the parties

[26] *Official Journal,* February, 1924; p. 357. [27] *Ibid.,* p. 364.

concerned draw up protocols to regulate communications and economic questions.[28] This recommendation was accepted and embodied in a resolution of the Conference of Ambassadors, of March 26th, 1924. At a conference held at Warsaw, in May, 1924, a mixed Polish-Czechoslovak Commission drew up protocols to regulate passport facilities for tourists, and for the population of the frontier-zone; also plans were made for using the River Bialka for production of electric power. The protocols are to be ratified by the Conference of Ambassadors, after which act the Jaworzina question will be definitely settled.

COMMENTARY

The first question which occurs to the observer who visits Jaworzina, and then reads the long debate over this infinitesimal point of European territory, is why this question, being primarily legal, was not referred to the Court for a judgment instead of being left to create friction and unrest. The expedition with which the Court dealt with its part of this dispute is a further illustration of the immense superiority of legal over political methods.

It may also be observed that the Council was established to deal with disputes upon a co-operative and conciliatory basis among its members which presupposes some voluntary concessions among them. The bitterness and tenacity with which every small point was contested on legal and highly technical grounds between Poland and Czechoslovakia, especially before the Council, even after the opinion of the Court was rendered, indicates the incompetence of a political body, constructed on such a basis, to deal with states whose spirit is not co-operative but competitive, and whose methods are not conciliatory but legal and technical. This dissonance between the original theory of the Covenant and the practice of Governments indicates the growing necessity to settle disputes by judicial decision by a body fully equipped to deal with these highly competitive and argumentative methods. This dispute has been detailed step by step since it offers an almost complete picture in miniature as to what is the matter with Europe today: On the one hand there is the greed for territory, the fear of war, the willingness to carve up natural boundaries and transgress every known law to possess an advantage in case of war; on the other hand are the Great Powers, which created the boundaries and created the minorities, disagreeing among themselves, vacillating in their policy, floundering among the ruins of self-determination and principles of nationality, and finally confessing defeat.

[28] *L. of N. Monthly Summary,* April, 1924; p. 63.

CHAPTER XXXII

THE S. S. WIMBLEDON AND THE KIEL CANAL

The Court of Justice has been requested by the parties to render one judgment, namely, under a compulsory clause of the Versailles Treaty, with Germany as the defendant.[1] It is reported that the suggestion that the question be referred to the Court was made by Germany.

THE FACTS IN THE CASE

The facts were simple and not contested. The S. S. Wimbledon, an English vesel, was chartered on January 28th, 1919, by the *Les Affréteurs Réunis* of Paris. It had loaded a cargo of 4,200 tons of ammunition at Salonica for use in the Russian-Polish war. On March 21st, 1921, it arrived at the entrance of the Kiel Canal, controlled by Germany, and applied for permission to pass on its way to the Polish Naval Base at Danzig. The passage was refused by the German Government on the ground that the cargo contained war materials for Poland; that the Treaty of Peace between Russia and Poland had not been ratified and therefore a state of war existed between these countries; and that on July 20th, 1920, Germany had declared its neutrality and published a decree prohibiting the transit of war materials. Protests were made by the French Government to the German Government but without avail; and after a delay of eleven days, on April 1st, the vessel proceeded by another route.

THE DISPUTE

This refusal of the German Government became the subject of an active correspondence between that Government and the Conference of Ambassadors to which body the French Government referred the matter. Two questions were involved: (1) Whether Germany had violated Article 380 of the Versailles Treaty which provides that "the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality";[2] and (2) reparations to France for the delay and loss incurred by the act of Germany.

[1] The Court at its session in June, 1924, had another issue before it, submitted for a judgment. The question concerns certain concessions in Palestine and the parties are Greece and Great Britain. (See page 448.)

[2] Arts. 381-386 deal with the detailed regulations of the principle set forth in Art. 380.

On January 16th, 1923, the Principal Allied Powers, acting jointly, and having regard to Articles 380-386 of the Treaty of Versailles submitted the question to the Court in accordance with Article 37 of the Statute of the Court which provides: "When a treaty or convention in force provides for the reference of a matter to a tribunal instituted by the League of Nations, the Court will be such tribunal." The petition to the Court concluded as follows: [3]

"To give notice of the present application to the Government of the German Empire, in accordance with Article 40, paragraph 2, of the Statute of the Court;

"To give judgment, whether the aforementioned Government is present or absent, and after the expiration of such times as shall be fixed by the Court subject to any agreement between the parties, to the effect:

"That the German authorities wrongfully refused on March 21st, 1921, free access to the Kiel Canal of the steamship 'Wimbledon';

"That the German Government shall make reparation for the loss incurred by the aforementioned vessel in consequence of this action, a loss which is estimated at francs 174,082.86, together with interest at 6% per annum as from March 20th, 1921."

On May 22nd, 1923, the Polish Government made an application to intervene on the ground that the refusal of Germany constituted a violation of the rights and material advantages guaranteed to Poland under Article 380. Its intervention was accepted by the Court. The German Government having been duly notified, accepted the jurisdiction of the Court, and in accordance with Article 31 of the Court Statute appointed M. Schücking as national judge to sit with the Court.

THE ARGUMENTS

It was contended by the Allied Powers that the S. S. Wimbledon was a merchant ship within the meaning of Article 380; that it belonged to a nation at peace with Germany; that the Treaty contained no allusion to war materials in transit; and that the only limitation was upon vessels of states at war with Germany. Also, it was contended that the provisions of the Treaty intended to place the Kiel Canal in a class with the Suez and Panama Canals, treating it as a great international highway and therefore it was not in the same class with the inland waterways which were subject to a different regime under Articles 321 and 327 of the Treaty. The separation of the Kiel Canal in a class by itself in the Treaty, it was contended, indicated that the Peace Conference had in mind placing it under a special regime. Also, the

[3] *P. C. of I. J., Series A, No. 1*; p. 7.

Treaty contains no references to war and peace times; and finally the Treaty obligations took precedence over the rights of sovereignty, as expressed in acts of neutrality under international law. The questions, therefore, arose whether the duty of neutrality, as established under international law, cancelled the obligations under the Treaty to give free passage through the Canal. It was also pointed out that a preliminary Peace Treaty was signed at Riga between Russia and Poland on October 12th, 1920; and ratified on November 2nd, and that the final Peace Treaty was signed on March 18th, 1921, to be ratified on April 30th. The further question was therefore whether the Polish-Russian war was ended at the date in question.

The representative of the German Government pointed out that the conditions existing between Poland and Russia and the activities taking place in the proximity of the Eastern Prussian border, and the attempts to transport war materials across Germany, were of a nature to cause Germany to issue a neutrality decree; also that as Germany had been deprived of all means of defense it was necessary to take every precaution to prevent war from spreading in its territory. He also stated that any diminution of Germany's right to declare itself neutral in future conflicts was incompatible with its sovereignty and was a limitation upon liberty of action. The representative pointed out the differences between the various regulations on the different international canals, and contended that the Articles subsequent to Article 380 indicated that Germany had the right to regulate imports and exports and that the Kiel Canal in reality constituted a part of the inland waterway inasmuch as it was not the only access to the Baltic Sea.[4]

THE MAJORITY OPINION OF THE COURT

The first question was whether the proceedings could be instituted by the Allied Powers. The Court held that each had a clear interest in the suit and therefore, under Article 386 (par. 1), could appeal to the Court. On the question of law the Court was of the opinion that the terms of Article 380 admitted of no doubt; that the Kiel Canal had ceased to be an internal waterway and had become an international highway to provide easier access to the Baltic for the benefit of all nations, and, as such, was open without making distinction between vessels of war and of commerce, with only one reservation, that these vessels must belong to nations at peace with Germany.

On the question of neutrality, the Court stated that it declined to see

[4] For speeches of representatives of the Allied Powers and of Germany before the Court, see *P. C. of I. J., Series C, No. 3,* pp. 100-407.

in any Treaty by which a state undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty. The right of entering into international engagements is an attribute of sovereignty. The Court pointed out, while the rules with regard to the Suez and Panama Canals were not similar, they were of equal importance in that they demonstrated that the use of great international waterways is not to be regarded as incompatible with the neutrality of riparian sovereignty. Germany was perfectly free to declare and regulate her neutrality in the Russo-Polish war, said the Court, but subject to the condition that she respected and maintained intact the contractual obligations of the Treaty of Versailles. The Court therefore did not feel called upon to decide whether that war had been terminated.

The Court, having concluded that Germany wrongfully refused passage to the S. S. Wimbledon, assessed the loss sustained at 140,749.35 francs. The amount claimed was 174,082.62 francs. The rate of interest demanded was 6% on the amount of the judgment from the date the vessel arrived at the Kiel Canal. The Court fixed the amount at 6% from the date of the present judgment. No higher rate of interest was awarded for the time beyond the date fixed for compliance, namely, three months, in the event that it had not been complied with. The following is the text of the judgment rendered:[5]

"1. that the German authorities on March 21st, 1921, were wrong in refusing access to the Kiel Canal to the S. S. 'Wimbledon';

"2. that Article 380 of the Treaty signed at Versailles on June 28th, 1919, between the Allied and Associated Powers and Germany, should have prevented Germany from applying to the Kiel Canal the Neutrality Order promulgated by her on July 25th, 1920;

"3. that the German Government is bound to make good the prejudice sustained by the vessel and her charterers as the result of this action;

"4. that the prejudice sustained may be estimated at the sum of 140,749 frs. 35 centimes, together with interest at 6% per annum from the date of the present judgment;

"5. that the German Government shall therefore pay to the Government of the French Republic, at Paris, in French francs, the sum of 140,749 frs. 35 centimes with interest at 6% per annum from the date of this judgment; payment to be effected within three months from this day.

"6. and that each party shall bear its own costs."

THE MINORITY OPINION OF THE COURT

MM. Anzilotti (Italy) and Huber (Switzerland) judges, and M. Schücking (Germany), national judge, dissented from this opinion. MM. Anzilotti and Huber held that the question before the Court was the following:[6]

[5] *P. C. of I. J., Series A, No. 1;* p. 33.

[6] *Ibid.*, p. 35.

"Do the clauses of the Treaty of Versailles relating to the Kiel Canal also apply in the event of Germany's neutrality or do they only contemplate normal circumstances, that is to say, a state of peace, without affecting the rights and duties of neutrality?"

The principles set forth by the dissenting opinion included the following: (1) The majority opinion affected the interpretation of international conventions in general. The question was not whether Germany was in a position to advance a neutral duty as a justification for her refusal, but whether the clauses of the Treaty applied in the event of German neutrality during war. (2) A state of war did exist between Russia and Poland, Germany was neutral and its waterway was being used to transport munitions. (3) In the interpretation of a contract which takes the form of an international convention, account must be taken of the complexity of inter-state relations and of the fact that the contracting parties are independent political entities; that such contracts are concluded having general regard to normal peace conditions; and that in the event of war, states are faced with the necessity of taking extraordinary measures to protect their neutrality. (4) The foregoing would not be effective if there were in the convention special definite provisions referring to circumstances arising out of war, but these are not to be found in the Treaty. (5) Germany, in allowing Allied and Associated Powers freedom of transit of her navigable waterways, did not lose the right to take such measures as may be necessary in time of war. (6) An obligation imposed on a state to leave open a waterway in time of war is only comprehensible, *in so far as such territory is protected from the action of belligerents.* (7) The obligations undertaken by Germany to maintain the Kiel Canal free to vessls of nations at peace with her does not exclude her right to take the measures necessary to protect her interests as a neutral power. In conclusion the minority opinion stated:[7]

"For this reason it seems difficult to admit a right, as between neutral States, enforceable at law to trade in and to transport contraband, whereas the same interests are unprotected as against a belligerent."

COMMENTARY

The first judgment of the Court, in relation to peace, is noteworthy in the following respects: It established the principle that an obligation under the Treaty of Versailles takes precedence over the sovereign rights of a state in the matter of exercising its neutrality with respect to two nations at war, one of whom was not a signatory to the Treaty;

[7] *P. C. of I. J., Series A, No. 1;* p. 42.

judgment was rendered by a divided Court; and intervention was granted to one of the belligerents in the war. The question involved a question of international law and an assessment of damages, both of which were disposed of in unmistakably clear legal terms. The judgment illustrates profoundly the immense advantage of parties proceeding directly to the Court for a judgment; and the superiority of judgment over opinion as a way of settling issues promptly and fully.

It should be noted, however, that the immediate object of seeking this one judgment from the court was in the interest of promoting a war then in progress; and that it contributed nothing to the maintenance of peace; on the contrary it opens legally the Kiel Canal for purposes of war.

CHAPTER XXXIII

QUESTIONS WITHHELD FROM THE COURT

From the foregoing record, it is evident that no really important issue affecting peace and security has been submitted to the Court of Justice. It is also apparent that in the matters which have been submitted, the Court has been restricted in its examination by the manner in which the Council has formulated the question; and that actual controversies have followed the course of advisory opinions instead of judgments, thus minimizing the authority of the Court and increasing that of the Council. Through this process, settlements have been delayed, thereby increasing bad will between states. It is also clear that the practice of submitting actual disputes in the guise of questions for advisory opinions has hampered the Court in dealing with questions fully on their merits. For instead of rendering a judgment, carrying its own terms of enforcement, certain opinions of the Court have given rise to a renewal of the negotiations and of the political manipulations which preceded the submission of the question to the Court.

The record of the matters not submitted to the Court indicates that during the life of the Court, European peace has experienced many shocks. In view of these events, already recorded, it is difficult to imagine with what greater astuteness any less human, more technical or less important matters could have been selected for submission to the Court. Despite efforts to popularize the work of the Court, people who are suffering from the economic and social devastations of the war, and those who live in the Ruhr, in the Saar, in Danzig, in Fiume, in Eastern Galicia, in Albania, Lithuania, in Bessarabia, or any one of the other areas of insecurity—refuse to be concerned about the manner of seating a Netherlands delegate at a labor conference. Governments which fought a war to win national security care very little whether Director Thomas of the Labor Organization is conducting researches in methods of agriculture, or that he wishes a conference to discuss an eight-hour day for farmers. The few thousand German settlers evicted by Poland might stir public sympathy if publicity on the matter were not of such an obscure nature and were there not several millions of other minorities oppressed under alien rule. To many, the nationality decrees of

Tunis and Morocco possess less interest than would the bombing from aeroplanes of the Bondelswartz in Africa if, by any chance, that question had reached the Court. As for the cases of the S. S. Wimbledon, and Jaworzina, their settlement was sought for strategic advantages in future wars rather than to preserve peace.

The spirit which lies behind the submission of these few relatively unimportant disputes is disquieting. The first three questions submitted to the Court were merely administrative differences which any competent business organization, with good will and common sense among its members, could have settled. The General Conference had full authority over seating its delegates; and the Governing Body on which France has a member had authority over the Director of the Labor Office, in the matter of agricultural research; but France must have him publicly disciplined by the Court. Had France and Great Britain exercised the good will expressed in the Treaty of 1903, they would have done in the beginning what they did in the end, come together in their foreign offices and settled the matter of the Nationality Decrees without involving the Court and the Council in their reluctance to observe their agreement to arbitrate or submit the question to judicial decision. The Allied Powers created the new states of Czechoslovakia and Poland and it was for them to enforce their decision of July 28th, 1920, without waiting for four years for a Court to decide whether their decision was final or not.

In other words, of the eight issues submitted to the Court for an opinion, none, with the possible exception of the violations of the Polish Minority Treaty, was really worthy of that tribunal. No one will seriously contend that any one of these questions involved a threat of war or menace of war or that the advisory opinions of the Court have prevented war. Nor is it possible to claim that the Court has at any point touched the vital spots in Europe where war is being bred by prevailing inequities and contentious strife.

Such is the positive aspect of the work of the Court in relation to the prevention of war. But what of the negative side? What of the disputes that remain unsettled, or which have been settled in a manner to perpetuate injustice; or adjusted temporarily until one side or the other becomes strong enough to apply force successfully? The more important of these questions will now be examined.

ROUMANIAN AGRARIAN REFORM AND THE HUNGARIAN OPTANTS

In the Kingdom of Roumania, the distribution of land was in need of adjustment when, in 1913, an agrarian reform law was first discussed.

About half of the eight million hectares of arable land was in possession of peasants and small farmers, while the other half was held by four thousand landowners, who let their farms on lease. The discussion of the law had to be postponed when the war broke out; but, in 1917, a Royal Decree promised the fulfillment of the reform and in 1918 a decree was passed by Parliament providing for the expropriation of two and a half million hectares, to be divided among peasants. In the following years, up to July, 1922, a series of laws was issued, affecting not only the old Kingdom of Roumania, but providing for expropriations also in the territories acquired from Hungary by the Treaty of Trianon, namely, Transylvania and the Banat. In December, 1920, the Hungarian Government appealed to the League, and the minority population of the ceded districts also requested that they be protected from the effects of the Roumanian legislation. These appeals remained unanswered. As the expropriation laws became more and more severe, the Hungarian Government appealed again, this time to the Conference of Ambassadors, in August, 1922. The protest stated that the new agrarian laws conflicted with Roumania's obligations under the Minority Treaty; to which the Conference answered that matters relative to Minority Treaties should, in accordance with these Treaties, be submitted to the League. To a subsequent Hungarian appeal, the Conference replied in February, 1923, that the initiative in bringing this matter before the League should be taken by Hungary.

APPEAL TO THE COUNCIL

Accordingly, in a note dated March 15th, 1923, the Hungarian Government, under Article 11, paragraph 2, of the Covenant, appealed to the Council of the League. The appeal protested against the Roumanian Agrarian Reform Law published on July 30th, 1921, which, in paragraph (c) of Article 6 ordered:[1]

"The whole of the rural estates of absentees shall be expropriated.

"For the purposes of this Law, an absentee shall be any person who was absent from the country from December 1st, 1918, until the date when this Law was placed on the table of the Parliament, unless such person was discharging official duties abroad. Rural estates not exceeding 50 *jugars* shall be exempt from the operation of this Law."

According to the view of the Hungarian Government this decree was incompatible with Article 3 of the Roumanian Minority Treaty, which provides:

[1] *Official Journal*, July, 1923; p. 730.

"Persons who have exercised the above right to opt must within the succeeding twelve months transfer their place of residence to the State for which they have opted. They will be entitled to retain their immovable property in Roumanian territory. They may carry with them their movable property of every description. No export duties may be imposed upon them in connection with the removal of such property."

The Hungarian note stated that the Roumanian decree had been interpreted in several ways by successive Roumanian Governments, some of the interpretations excluding foreigners from expropriation, some specifically stating that those who opt for nationality of another state shall be regarded as subjects of a foreign state; but finally, in July, 1922, three orders were issued to the effect that no difference in the enactment of the above laws was to be made between Roumanians and other nationals, and another decree at the same time provided for a shorter procedure in matters concerning the agrarian reform, and expropriations were rapidly effected. The majority of Hungarian optants had already, under this decree of absence, lost their immovable property. This procedure was especially unjust, because the period from December 1st, 1918, to March 23rd, 1921, included the first months of the occupation of Transylvania by Roumanian troops, during which time many Hungarians were compelled to take flight, or were expelled by Roumanian officials. Later, the new Roumanian frontier was closed for several months, and those who had fled or were absent at the time of occupation were unable to return. The indemnity provided in the law of July 30th, 1921, was determined by the sale price of the land in 1913, or by rent paid by farmers at the same period, or by land taxes during the five years preceding 1913, but in no case was it set higher than the figures of 1913, which were calculated in the Roumanian currency, the *lei*. Owing to depreciation of the *lei* since 1913, the owner would receive only about one-fortieth of the actual value of his land. This compensation was paid in state bonds at five per cent, redeemable in fifty years, and the sale of bonds was forbidden. At the time of the complaint, these bonds were valued at forty per cent of their nominal value, consequently the owner received forty per cent of one-fortieth, or one per cent of the real value of his property. In the Hungarian note, attention was also drawn to the fact that the decisive period for absentees was prior to the coming into force of the Treaty of Trianon.

The new Roumanian Constitution also furnished ground for protest, as Article 18 provided that none but Roumanians could acquire and retain landed property in Roumania. The Hungarian note alluded

to further discrepancies between the Agrarian Reform Laws and the Minority Treaty and ended by submitting the request that the Council of the League of Nations should deal with the question at its next meeting. The matter was urgent, since a number of persons of small means had been rendered virtually beggars and were living in great poverty, while awaiting the decision of the League. The note asked that the Council "should give a ruling on the substance of the question," namely:[2]

"By declaring that the legislative and administrative enactments of the Kingdom of Roumania, to which reference has been made, are contrary to the Treaties;

"By ensuring, as regards the future, that the Legislature and the Government of Roumania should act in conformity with the provisions of the Treaties which have been invoked;

"By ordering that the immovable property of persons opting in favour of Hungary, which has been affected by the confiscatory measures adopted in connection with the agrarian reform now being carried out in Roumania, should be restored to the parties entitled thereto in the condition in which it was before the application of the measures in question; also that it should in future be maintained in that condition, free from all charges, contrary to the provisions of the Treaties, and that full compensation for damage should be given to the injured parties."[3]

[2] *Official Journal,* July, 1923; p. 735.

[3] In addition to these complaints, Hungary based its claims on the fact that the Agrarian Law for the old Kingdom of Roumania differed from the law for the ceded territories. The summary of these differences is as follows: (1) Article 10 for ceded territories deprives former Hungarian settlers in Transylvania of their holdings, irrespective of their size. (2) Article 24 exempts from expropriation lands held by regiments of Roumanian ex-frontier guards, but not lands held on the same legal basis by former regiments of Szekler frontier guards (*) by reason that these lands were property of the Hungarian State. (3) The legal maximum holdings are from 100 to 500 *jugars;* in the ceded territories provision is made, however, for "exceptional maxima" which permits the reduction of large estates to fifty, thirty and even in some cases ten *jugars.* (4) The figures for maxima are equal in the old Kingdom and in Transylvania but in the first case they refer to hectares and in the second to *jugars,* leaving approximately twice as much property to Roumanian landowners than to Transylvanians, as a jugar equals 0.575 hectare. (5) The law permits acquisition of additional land, but Article 18 of the Roumanian Constitution provides that only Roumanians may purchase. (6) Article 7 of the law of the old territory provides that estates which were continuously leased during the ten years mentioned in the law shall be expropriated, while the corresponding article for the ceded territories is interpreted to include estates which were let at any time within the specified period. (7) The law of the old territory provides compensation in kind for owners whose property is expropriated above the normal maxima, while there exists no such provision for the ceded territories.

* Szeklers are of pure Hungarian race and have been settled in Eastern Transylvania for over 1000 years.

On April 20th, 1923, the Council discussed the matter. The Hungarian representative repeated the protests of the Hungarian note, pointed out the numerous and conflicting interpretations with regard to the application of the absentee law to foreign nations, stated that 180,000 persons had been obliged to take refuge from the Roumanian troops in 1919, and laid stress on the fact that the Roumanian law was retroactive, the territory it affected being, at the date mentioned—December, 1919—legally not yet Roumanian, as the Treaty of Trianon only came into force in July, 1921. Accordingly he suggested:[4]

"That the Council of the League of Nations should declare that the measures taken by Roumania are contrary to the Treaties, and that Roumania should take measures entirely in conformity with the stipulations of the international treaties, which have been invoked.

"That the Council should order that the immovable property of persons opting in favour of Hungary, confiscated as a measure of agrarian reform, should be restored to them, and that the persons opting in favour of Hungary, affected by this confiscatory measure, should be compensated for the damage which they have suffered, and should not in future be inflicted with burdens contrary to the provisions of the international treaties."

M. Titulescu, the Roumanian representative, claimed, on the contrary, that the Roumanian agrarian law dated from 1913, that its enforcement had only been prevented by the war, and it applied alike to Roumanians and Hungarians. He stated that measures as to absentee landowners had been applied to both nationalities and the Roumanian Government could not place Hungarian optants or other foreigners in a privileged position, by not applying these laws to them; the Treaty of Trianon could not be interpreted to give private rights, exempt from the legislation of sovereign states. He asserted that such a privilege was claimed by the Hungarian optants when they asked to be exempted from expropriations. Compensation for expropriations was alike, he said, for Roumanians and Hungarians, and Hungarians could not expect privileges in this respect.[5]

At the meeting of April 23rd, 1923, M. Adatci (Japan), *rapporteur*, drew the conclusion that, according to the Hungarian point of view, Roumania was not acting consistently with its treaty obligations, and according to the Roumanian point of view, its agrarian law was not contrary to the Treaties; therefore this question was clearly a matter of *interpretation* of Treaties and, as such, belonged to the jurisdiction of the Permanent Court of International Justice. He recommended that a resolution to this effect be passed by the Council.

[4] *Official Journal*, June, 1923; p. 574.
[5] *Official Journal*, June, 1923; pp. 575-576.

The Hungarian representative stated that after a delay of several months the Principal Allied Powers had referred Hungary to the League for a decision, but in spite of the further delay involved, Hungary was willing to submit the matter to the Court. He requested that the Council take measures similar to those taken in the case of the German minorities in Poland,[6] and that Roumania suspend further expropriations until the matter was settled. Also, in the cases where expropriation had taken place, but where the property had not yet been divided, he proposed that the Hungarian owners should be left to cultivate their possessions until a decision had been reached. M. Titulescu, however, stated that the agrarian law was part of the Roumanian Constitution and the Constitution could not be submitted to arbitration by a third party, not even to the Permanent Court, and the law affected millions of peasants, and admission that it might possibly be changed would create political disturbances in Roumania. For these reasons he refused to submit the matter to the Court.

The *rapporteur,* in answer to this resort to the Roumanian Constitution, drew attention to Article 1 of the Roumanian Minority Treaty, which provides:[7]

"Roumania undertakes that the stipulations contained in Articles 2 to 8 of this chapter shall be recognized as fundamental laws, and that no law, regulation or official action shall conflict or interfere with these stipulations, nor shall any law, regulation or official action prevail over them."

To this statement the Roumanian representative replied that the matter did not come under the Minority Treaties, as the optants, properly speaking, were not minorities in Roumania. Also, he argued, Hungary was present at the Council, which was not in accordance with minority procedure, but proved that Article 11, paragraph 2, of the Covenant had been invoked. The *rapporteur* then proposed that an advisory opinion be requested by the Council from the Court, but the Roumanian representative declined, making the following statement:[8]

"I feel bound to ask, first of all, whether a Member of the League of Nations can appeal to the Council on the basis of Article 11, paragraph 2, of the Covenant without any accessory facts in respect of every patrimonial question which has not been settled as regards its nationals in the manner which it considers right.

"I also can invoke Article 11, paragraph 2, of the Covenant and say that the Hungarian request as formulated and the fact that there is a delay in

[6] Chap. XXX; p. 569. [7] See similar law for Poland; p. 72.
[8] *Official Journal,* June, 1923; pp. 608-9.

finding a solution are greater menaces to peace because they might excite passions and create feeling in millions of Roumanian subjects regarding patrimonial interests which are submitted to an international jurisdiction which is incapable of judging them.

"You, gentlemen, are not a tribunal. Assuming that you will agree with me and that in your opinion the Roumanian Government's view should be recognised as correct and that it could not longer be maintained that the treaties have not been violated, and that the Roumanian laws are equal for everyone, the case is not yet finished. Even so, your decision would be of no assistance to me, because the persons who have opted for Hungary are, as regards their legal relations with the Roumanian Government, not represented here; and you would keep the question open in order to ask for an advisory opinion on a legal point, while knowing perfectly well from the very beginning that the legal point is not the question at issue? The question at issue is the threat to peace, namely the Hungarian request, the conclusions of which may produce agitation. If the request had been drafted otherwise it might perhaps be adjourned; but the Hungarian Government does exactly the opposite of what it ought to do in order to invoke the application of paragraph 2 of Article 11 of the Covenant; that is, it is making requests which create agitation. * * *

I might have said at the outset that the League of Nations was not competent to settle the legal question and I might not have discussed it. I did not adopt this policy because you would have said that I was evading justice.

"The consequences of this attitude are that you now regard this question as being primarily a legal one, although it is really a question of relations of good neighbourliness, the legal aspect of which is only of interest in so far as the opinions which may be held regarding it may threaten to disturb peace. You cannot be of opinion that the interests of peace at the present moment require opinions on questions of law for which a positive solution will never be found. After receiving a technical opinion, you will be better informed legally, but peace demands that the question should not be kept open."

The President of the Council accordingly proposed a resolution: (1) postponing to its next session further discussion of the question; (2) inviting the *rapporteur* to continue examination of the question and to submit his report to the Council; (3) inviting the governments of Hungary and Roumania to forward to the *rapporteur* all information; (4) advising Roumania "to abstain from any further action and to suspend any steps which might prejudice the definite solution of this matter."[9] M. Titulescu objected to paragraph 4 and asked that "a text should be substituted, stipulating that the adjournment did not mean that the Hungarian request had necessarily been taken into favorable consideration."[10] The Hungarian representative thereupon stated that he had been refused, first a deci-

[9] *Official Journal,* June, 1923; p. 609. [10] *Ibid.,* p. 610.

sion from the Council, then a judgment from the Permanent Court, and finally an advisory opinion from the Permanent Court, and that he was unable to accept the resolution without paragraph 4. In despair, the *rapporteur* asked to be relieved of his duties. He was requested, however, to reconsider his decision, and M. Hanotaux (France) suggested that the question be considered under paragraph 4 of Article 15 of the Covenant, authorizing the Council to make a report containing the statement of facts of the dispute, with recommendations. The Roumanian representative agreed that under this Article he would accept adjournment of the question, but only if it were understood that the adjournment "did not imply in the least that the Council recognized the Hungarian complaint." The Council then passed the following resolution on April 23d, 1923: [11]

"The Council, having heard the discussion relative to this question, regrets that it sees no present prospect of agreement, and is therefore unable to make any suggestion which would lead to its immediate solution.

"It accordingly remits the questions for further consideration at the next session of the Council, expresses the hope that M. Adatci will continue to act as *rapporteur*, and in the meantime trusts that the Governments of Hungary and Roumania will direct their best efforts towards the attainment of an agreed solution."

DISCUSSION IN BRUSSELS

In accordance with the resolution of the Council, the Hungarian and Roumanian representatives met on May 26th at Brussels, where M. Adatci, as Ambassador of Japan, was stationed. The discussion was to take place under his auspices, but, the directors of the legal and political sections, together with two other members of the Secretariat of the League, were present and offered their services. The Hungarian request covered five points, as follows: (1) Discrepancy between the Roumanian agrarian law and the provisions of the Treaty of Trianon. (2) Aggravation of the situation by the absentee law and by ensuing discrepancies; (a) Provisions of the Treaty compelling Hungarian optants to transfer their domicile outside of Roumania, conflicting with provisions of the absentee law. (b) Cases where Hungarian refugees were not permitted to return to Roumania and thus were subject to the absentee law. (3) Questions of compensation. (4) Provision of the Roumanian Constitution, specifying that only Roumanian subjects may acquire and keep territory. (5) Interpretation of the Hungarian Government's request, stating that there

[11] *Official Journal*, June, 1923; p. 611.

were other provisions which "injuriously affect the rights of the Hungarians." [12]

Point for point the Hungarian requests were discussed and pleaded. It was pointed out that Hungary, by showing a conciliatory spirit, would win the good will of the League, and thus help the optants more than by insistence upon appeal to the Court, which might render an adverse judgment. After three days of argument, M. Adatci presented a draft report, summing up the results as follows:[13]

(1) The Hungarian representative admitted that the Treaty of Trianon "did not preclude expropriation of property of optants for reasons of public welfare." (2) As to the first question, the Hungarian representative agreed that the dates mentioned in the agrarian law—December 1st, 1918-March 23rd, 1921—and the date fixed by the Treaty of Trianon were not identical, and therefore it was not impossible for optants to be in Roumania during the time required by the agrarian law, and to remove their residence within the time required by the Treaty. As to the second question, the Roumanian representative "was sure that the persons concerned would be accorded full justice within the limits of the Roumanian law and of cases which had already been definitely settled." (3) The question of indemnity remained unsettled, as no compromise could be reached. (4) The Roumanian representative stated that, as regards Article 18 of the Roumanian Constitution, "he was considering the possibility of making certain statements to the Council on this point." These statements were to be:[14]

(a) "Hungarian optants who have already been subjected to measures of expropriation under the agrarian law are afforded a guarantee that they may keep the immovable property which they still possess, notwithstanding the provisions of Article 18 of the Roumanian Constitution.

(b) "If, in practice, other circumstances being equal, the agrarian law of Transylvania has been interpreted in a different manner for Hungarian optants than for Roumanian subjects, each individual case, when brought to the notice of the Roumanian Government, will be considered separately, in order to ensure equal treatment for all in conformity with the intentions of the law."

(5) The Hungarian representative admitted that the points summarized under the expression "other provisions" would have to be presented anew, since they were not included in the original request, and since the fact that the agrarian law for the old Kingdom of Roumania differed from the laws for the ceded territories, could not

[12] *Ibid.*, August, 1923; p. 1012.
[13] *Official Journal,* August, 1923; pp. 1012-14. [14] *Ibid.*, p. 1014.

in itself be considered ground for complaint. To this report M. Adatci added a draft resolution, as follows:[15]

"The Council, taking note of the various declarations contained in the minutes attached to the report of the Japanese representative, hopes that both Governments will do their utmost to prevent the question of Hungarian optants from becoming a disturbing influence in the relations between the neighbouring two countries.

"The Council is convinced that the Hungarian Government, after the efforts made by both parties to avoid any misunderstanding on the question of optants, will do its best to reassure its nationals;

"And that the Roumanian Government will remain faithful to the Treaty and to the principle of justice upon which it declares that its agrarian legislation is founded, by giving proof of its good will in regard to the interests of the Hungarian optants."

M. Adatci then requested the representatives of both countries to append their signatures. The Hungarian representatives at first refused and then, pressed by arguments, and tempted by vague allusions to concessions, in a stormy and hurried final discussion, during which the departing Roumanian representative on the way to make his train, gave them time only for a brief "yes" or "no," one of the Hungarian representatives signed his initials to the draft resolution, as did also the Roumanian representative.[16]

But before the report and resolution were forwarded to the Council, M. Adatci received a note, dated June 12th, 1923, from the Hungarian Minister of Foreign Affairs, expressing regret that the Brussels negotiations had failed; and stating that the Hungarian Government could not accept the resolution of the League of Nations, which left the question unsolved. This note was supported by an attached memorandum which stated that: (1) The Hungarian representatives had full power only to sign an agreement between Roumania and Hungary; (2) The discussions between the representatives of the two Governments under the auspices of M. Adatci and with the intervention of some members of the Secretariat of the League led to no agreement; (3) The Hungarian representatives took part in the preparation of the report drawn up by M. Adatci, with a view to the

[15] *Official Journal*, August, 1923; p. 1011. This resolution expresses the height of weak sentimentality into which international relations have fallen since the war. The pious wishes expressed are a cloak of hypocrisy spread over incompetence.

[16] This procedure, in which members of the Secretariat, officially unauthorized by the Council and uninvited by the parties, played an ignoble part, and followed a devious course of "peace at any price" was utterly unworthy of the League, and could never have taken place in a judicial determination of the issue by the Permanent Court. It constitutes a flagrant violation of the principles of arbitration, unjustified by any threat of war.

matter being taken up again by the Council at its next session; and one Hungarian representative was persuaded to sign a part of this text, namely, a draft resolution. (4) The Hungarian Government had not foreseen the preparation of such a report and resolution, much less given its representatives full powers to sign. Accordingly, the Hungarian representative had exceeded his powers and his signature could in no way be considered as binding on his Government. The memorandum ended by renewing the request that the question be submitted to the Permanent Court for judgment, or failing that, for an advisory opinion.[17]

DECISION OF THE COUNCIL

On July 8th, 1923, M. Adatci submitted a report to the Council on the Hungarian note, together with a report upon the Brussels negotiations. In the ensuing discussion, Count Apponyi, representing Hungary, having pointed out the injustices created by the Roumanian Reform, and the fact that the draft resolution of the Council was unacceptable, in not solving the situation, concluded:[18]

"We are told by way of reassurance to fear nothing. There is the League of Nations. There is the Permanent Court of International Justice. I am given to understand that, if I have grievances, I may have recourse to this machinery, and that I must not seek justice at my own hands. Here, however, a legal difficulty has presented itself for which we wish to find a solution. But the way towards the tribunal is barred. I must declare, on behalf of my Government, that we cannot accept this situation. * * * At this moment we are not asking for advice, but for an act of justice. We are asking for a judge, and our moral position is not inferior to the position of those who refuse our request."

The request was of no avail. The Roumanian representative insisted that the report of M. Adatci including the foregoing draft resolution was the basis on which the Council should formulate a resolution. The members of the Council were unanimous in their opinion that a signed agreement had to be respected,[19] and the draft resolution, as submitted by M. Adatci was passed by the Council.[20]

In the name of the Hungarian Government, Count Apponyi made a statement, making clear the Hungarian point of view:[21]

[17] *L. of N. Document C-404,* 1923; VII.

[18] *Official Journal,* August, 1923; p. 893.

[19] Contrast this opinion with that held by the Council in the Suwalki Agreement, where a signed Treaty was broken and ignored by the Council. (Chap. XI; p. 249.)

[20] P. 622 for text.

[21] *Official Journal,* August, 1923; p. 908.

"The question of the Hungarian optants in the districts detached from Hungary and annexed to Roumania being a legal question, the Hungarian Government continues to think that while an agreement, which it has not up to the present been possible to realise, is still lacking, the only solution capable of solving the problem and easing the situation, which all the world desires, is a judicial settlement on the substance of the case. The Hungarian Government is unable to recognise that the minutes of the negotiations at Brussels, which did not result in a final agreement on the substance of the question, could involve it in any obligation.

"The profound respect which it feels for the Council of the League of Nations imposes upon it the duty of stating quite frankly that it is impossible for it, as it would be impossible for any other Government which found itself in a similar position, to take effective steps towards restoring peace in the minds of nationals who consider themselves and whom it also considers (so long as the judgment which they demand is refused) to be injured in respect of rights guaranteed by treaties.

"The resolution accepted by the Council does not contain—as was expressly stated in the report of His Excellency M. Adatci—any decision regarding the substance of the case. The Hungarian Government therefore reserves the right to take any future steps which the treaties and the Covenant of the League of Nations may allow in order to obtain justice for those which it has the right and the duty to represent."

The President of the Council then requested the parties to regard the resolution in a spirit of conciliation; this, regardless of what the attitude might be among the optants who had lost their property or were homeless. Thus the efforts of the Council to protect minorities in Roumania, ended with the pious hope that Roumania would remain faithful to the Treaty, and would give proof at home of a good will which was entirely lacking at the Council table.

There is much in the refusal to submit this question to the Court and in the indifference with which the Allied Powers regarded their own responsibility under the Minority Treaty to cause disheartenment to small states which have placed their faith in the League and their hope in the Court.

THE POLISH-LITHUANIAN SETTLEMENT

It will be recalled that the Council on February 3rd, 1923, abandoned the settlement of the Polish-Lithuanian dispute over Vilna, but adopted a recommendation for the division of the neutral zones which it had created between the two countries when it undertook in 1920 the task of settlement.[22] This proposed division of territory awarded Vilna to Poland and was accepted by the Conference of Ambassadors which confirmed the legalization of that military conquest. As a

[22] Chap. XI; p. 259.

result of this dispute, two legal questions were raised by the Lithuanian Government. The first question arose under the powers exercised by the Council in recommending a provisional demarkation line. The Lithuanians contended that the question of a boundary line was not referred to the Council for final decision by the parties to the dispute and the right to make a proposal concerning it could not be conferred upon that body by any other authority. The second question grew out of the conflict between the principle enunciated in the resolution of January 13th, 1922, wherein the Council asserted that a settlement, to have its approval, must also have the approval of both parties to it; and the declaration of the President of the Council on February 3rd, 1923, wherein he stated that when the Council reached a unanimous agreement, the foregoing principle did not apply, and Lithuania was therefore ordered to obey the unanimous decision of the Council. On April 21st, 1923, the Minister of Foreign Affairs for Lithuania requested the Council to place the following items upon the agenda of the Fourth Assembly of the League of Nations.[23]

"1. The request of the Lithuanian Government concerning the action to be taken in pursuance of the resolution of the Council of the League of Nations dated January 13th, 1922, which reads as follows: 'The Council cannot recognize any solution of a dispute, submitted to the League by one of its Members, which may be reached without regard to the recommendation of the Council or without the consent of both the parties concerned.'

"2. The petition of the Lithuanian Government to the Assembly of the League of Nations requesting the latter to ask for the advisory opinion of the Permanent Court of International Justice with regard to the two following points:

"(1) Has the Council of the League of Nations the right, when a dispute is submitted to it under Paragraph 1 of Article 15 of the Covenant, to address to the Parties, with regard to incidental questions which have not been expressly submitted to it, recommendations having the force of the Council reports referred to in paragraphs 4, 6 and 7 of the same article?

"(2) If the recommendations of a report by the Council of the League of Nations have been adopted in the circumstances contemplated in paragraph 6 of Article 15 of the Covenant of the League of Nations and have been accepted by one of the Parties, are such recommendations binding upon the other Party if it does not accept them? And, secondly, if, within the period fixed by Article 12 of the Covenant, it goes to war with the Party which accepts the report, is it liable to the penalties laid down in Article 16?"

When these questions were referred to the Sixth Committee of the Assembly, the Chairman believed that they raised an additional ques-

[23] *Records of the Fourth Assembly;* Minutes of the Sixth Committee; p. 9.

tion which should take precedence, namely, "may a discussion previously opened before the Council, and closed by the formal adoption by the Council of the findings in a report, be reopened before the Assembly?" [24]

This question was sent to the First Committee, which reported as follows:[25]

"The Committee is of opinion that, although the Assembly could not take into consideration a question the solution of which is pending before the Council, nevertheless if the question of competence is raised in relation to the contents of the report made by the Council, this point does not constitute a matter expressly committed to the Council and that the Assembly may consider itself competent to order a reference to the Court if it thinks it desirable.

"But in expressing this opinion, the Committee does not wish to make any pronouncement upon the other legal objections which might be made in regard to the requests for an advisory opinion formulated in the Lithuanian proposal or on the advantages or the inconveniences that, in the particular case put by Lithuania, may attend the exercise of the right of the Assembly thus recognised in principle."

This opinion was not reached without an acute discussion upon the advisability of the Assembly passing upon the competence of the Council. *The French representative was emphatic that it was more important to protect the authority and prestige of the Council—and thus the future and very existence of the League—than it was to decide the questions raised by Lithuania.* He argued that the authority, prerogatives, and prestige of the Council should be left untouched; he maintained when a question was put before one of the two bodies and that body had considered it, the question could not be put before the other body.[26]

Therefore, pressure was brought to bear upon Lithuania to postpone this question until the Fifth Assembly which is to meet in September, 1924. To this suggestion, the Lithuanian delegation assented on the following grounds:[27]

"Apart from the fact that the above-mentioned questions affect matters which go beyond the sphere of the dispute between Lithuania and Poland and raise points of importance for the future of the League of Nations and for its jurisprudence, they are of very special interest to the Lithuanian Government. That Government is faced with the existence of a provisional line of demarcation which the Council of the League of Nations traced in the

[24] *Records of the Fourth Assembly,* Minutes of the Sixth Committee; p. 39.
[25] *Ibid.*
[26] *Records of the Fourth Assembly,* Minutes of the First Committee; p. 19.
[27] *Records of the Fourth Assembly,* Minutes of the Sixth Committee; p. 37.

above-mentioned circumstances and which the Lithuanian Government does not recognize. The position has been rendered considerably worse by the fact that the Conference of Ambassadors has seen fit to refer in its resolution regarding the eastern frontier of Poland to the said decision of the Council.

"Nevertheless, as no reply has been received from the Conference of Ambassadors to the note of the Lithuanian Government of April 16th, 1923, referring to the above mentioned resolution of the Conference of Ambassadors, and as I am anxious, on the other hand, to take into account the suggestions made to me in this connection by members of the Sub-Committee on the Lithuanian question, I venture very respectfully to beg Your Excellency to propose to the Sixth Committee and to the Assembly that the further examination of the question placed on the agenda of the Fourth Assembly at the request of the Lithuanian Government should be referred to the next plenary Assembly of the League of Nations."

The questions raised by Lithuania are of a wide significance, in view of the fact that the question of the Council exceeding its authority had been raised previously.[28]

LITHUANIAN-MEMEL CONTROVERSY

Lithuania appears to have been ready to submit another difference to the Court, namely, that of interpreting the decision of the Conference of Ambassadors, contained in its note of February 16th, 1923, specifying the conditions under which Lithuania should receive Memel. The Lithuanian Government proposed that, inasmuch as the interpretation of this note was a legal question, it should be referred to the Court of Justice. The Conference refused, preferring to treat this matter as a political question and referred it to the Council of the League which appointed a special committee to determine the matter. Thus, notwithstanding the request of the party most deeply concerned, the Court was again set aside and preference shown for political adjustment.[29]

It is to be questioned whether this policy of barring the way to the Court to small nations, instead of encouraging their willingness to submit their disputes to juridical examination, is in harmony with the principles of peace and justice.

THE FRENCH-SWISS ZONES

The city of Geneva is situated at the extreme southwestern corner of the Lake of Geneva and of Switzerland. The territory of the city on three sides borders on France. To facilitate the sending of sup-

[28] In the transfer of Eupen and Malmedy, as to whether the Council constituted the League, as specified in the Treaty. (Chap. XV; p. 316.)

[29] Chap. XII; p. 264.

plies to the city, the customs frontiers were not drawn coincident with the political frontiers of the countries, but further back, thus forming so-called "free zones" between the customs lines and the political boundary. These zones were four in number, established at different periods: the zone of Gex, to the northwest of Geneva, first established in the early seventeenth century by treaty with France, and re-established by the Congress of Vienna in 1815; the two small zones of Savoy, at the southwestern end of the lake, established in 1816 by treaty with the Kingdom of Sardinia, to which Kingdom Savoy belonged at that time; and the large zone of Savoy running nearly the whole length of the southern shore of the lake, established in 1860 by Napoleon III, when he joined Savoy to France.[30]

It appears that in 1815 and 1816 the zones were set up by mutual agreement and there was a free zone around Geneva also on Swiss territory. But in 1849 the Swiss customs frontier was advanced to the political frontiers of the country, in spite of protests from France and Sardinia, which countries, bound by the provisions of the Congress of Vienna, could not move their customs line.

When Savoy was joined to France, all zones were on French territory and a situation was created whereby French products were taxed on entering Switzerland, but Swiss products could be taken into the free zone districts of France without tax or duty. During the negotiation of the Treaty of Versailles, France demanded the abolition of these zones, which, it claimed, gave one-sided advantages to Switzerland. Accordingly, the assent of the two powers signatory to the Convention of 1815, but not signatory to the Treaty of Versailles, namely, Sweden and Spain, being gained, the following Article was inserted in the Treaty:

"Art. 435. The High Contracting Parties, while they recognize the guarantees stipulated by the Treaties of 1815, and especially by the Act of November 20, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations and other supplementary Acts concerning the neutralized zone of Savoy, as laid down in paragraph I of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.

[30] In addition, in 1815, a neutral zone was established in Savoy, south of the two small zones. This was more a military than a customs provision.

"The High Contracting Parties also agree that the stipulations of the Treaties of 1815 and of the other supplementary Acts concerning the free zones of Upper Savoy and the Gex districts are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries.

To this Article was added an Annex, containing a note from the Swiss Government, dated May 5th, 1919. This note stated that, as regarded the neutral zone of Savoy, the assent of the Swiss Government pre-supposed the recognition of guarantees in favor of Switzerland, as formulated in the Treaties of 1815; and as regards the free zones of Gex and Savoy, the Swiss Government held the following:

"(a) The Federal Council makes the most express reservations to the interpretation to be given to the statement mentioned in the last paragraph of the above Article for insertion in the Treaty of Peace, which provides that 'the stipulations of the Treaties of 1815 and other supplementary acts concerning the free zones of Haute-Savoie and the Gex district are no longer consistent with present conditions.' The Federal Council would not wish that its acceptance of the above wording should lead to the conclusion that it would agree to the suppression of a system intended to give neighbouring territory the benefit of a special regime which is appropriate to the geographical and economical situation and which has been well tested.

"In the opinion of the Federal Council the question is not the modification of the custom systems of the zones as set up by the Treaties mentioned above, but only the regulation in a manner more appropriate to the economic conditions of the present day of the terms of the exchange of goods between the regions in question. The Federal Council has been led to make the preceding observations by the perusal of the draft Convention concerning the future constitution of the zones which was annexed to the note of April 26 from the French Government. While making the above reservations the Federal Council declares its readiness to examine in the most friendly spirit any proposals which the French Government may deem it convenient to make on the subject.

"(b) It is conceded that the stipulations of the Treaties of 1815 and other supplementary acts relative to the free zones will remain in force until a new arrangement is come to between France and Switzerland to regulate matters in this territory."

The Annex also contained a reply to the above observations from the French Government, stating that it merely desired to adjust its frontier line "as was done by Switzerland long ago on her own boundaries in this region" and expressed the hope that there would be no delay in making new provisions satisfactory to both countries.

Negotiations were then begun between the two countries and an

agreement was reached on August 7th, 1921. This agreement suppressed the zones and provided among other things, for the submission to the Permanent Court of International Justice of any question concerning the interpretation and carrying out of this treaty. This Convention was duly signed and ratified by the Swiss Federal Chambers in March, 1922, and by the French Parliament, on February 16th, 1923. But the Swiss Constitution provides that Conventions which are to be binding for a longer period than fifteen years, shall be submitted to a popular vote.[31] This was done, in February, 1923, and the Convention was rejected by a large majority. The French Government was notified, and a prolonged correspondence followed, but no basis for further negotiations was reached.

On October 10th, 1923, M. Poincaré notified the Swiss Minister to Paris that: the Convention of August 7th, 1921, had been ratified by the French Parliament on February 16th, 1923, thereby becoming a law; further offers and suggestions made by France had been ignored by the Swiss Government; the population of the zones, in its General Assembly, had passed a resolution requesting that the French Government put into effect the law of February 16th, 1923, without further negotiations with Switzerland; consequently, the law would come into force on November 10th, 1923, and on that date the French customs frontier would be transferred to the political frontier of France and Switzerland.

To this note the Swiss Minister to Paris replied on October 17th. He pointed out that the Convention of August 7th, 1921, had been a voluntary concession on the part of the Swiss Government and not an obligation laid on that Government by any law; that the popular vote had shown that the people of Switzerland were against the Convention; and that the notes and offers of the French Government during the summer of 1923 had been merely re-phrasings and repetitions of the unacceptable Convention and that the Swiss Federal Council was working out a draft for a new Convention, to be submitted to France during the month of October, of which fact the French Government had been notified. The note stated that Article 435 of the Treaty of Versailles and the Swiss note of May 5th, 1919, formed one inseparable unit; and since apparently there were differences in the interpretation of this Article, the Swiss Government

[31] It seems that this is a modification of the Swiss Constitution, and that this amendment concerning a popular vote on Conventions binding for longer than fifteen years was only introduced in April, 1921, and applied for the first time in the above case.

considered that these controversial points should be submitted to the Permanent Court of International Justice. The points to be considered were the following:[32]

"(1) Are the rights possessed by the Swiss Confederation up to the present time as the result of the treaties of 1815 and 1816 still in force?

"(2) Can Article 435, last paragraph, of the Treaty of Versailles, be set up as against the Confederation, except in the sense of and within the limits laid down by the note of the Federal Council dated May 5, 1919?[33]

Finally, the Swiss Government refused to enter into any negotiations unless the French Government declared that the application of the law of February 16th, 1923, would be suspended during their course. On October 25th, M. Poincaré replied that the Government of the Republic failed to understand why the application of the law of February 16th, 1923, should prevent the Swiss Government from presenting its proposition. On the contrary, France considered that the shifting of the customs line was merely a "stage in the negotiations"; and proposed that these be resumed. The note ignored the suggestion of reference to the Permanent Court. The Swiss Minister to Paris, in a note on October 30th, explained the basis of the new convention suggested by the Swiss Government, then in process of being worked out by the Geneva Chamber of Commerce. It was proposed that Switzerland would renounce the stipulations of the Treaty of 1816, if the French Government would guarantee to establish, by a new convention, a new free zone, corresponding in location and area to the former zones. The note asserted that Switzerland could not take up negotiations with France on any basis but that of complete equality, which would not be assured if the French customs zones were transferred and Switzerland had to deal with a *fait accompli*. Finally, attention was drawn to the fact that the French note of October 25th ignored the subject of arbitration, although, under Article 13 of the Covenant this question—interpretation of treaties—was typically one to be submitted for such procedure.[34]

To this statement M. Poincaré, in a note on November 7th, replied that France could not reconsider the terms of the notes of October 10th and 25th. The French Government considered recourse to arbitration premature since it was ready to continue diplomatic nego-

[32] *Christian Science Monitor,* January 8th, 1924.

[33] For complete text of notes of October 10th and 17th see *Journal de Genève,* October 18th, 1923.

[34] *Le Temps* of November 2nd commenting on this note says: "Our national integrity is not one of those pears one would hand to an arbiter for him to cut in two."

tiations; if, however, it proved impossible to reach an agreement, the French Government would submit the matter to arbitration.[35]

On November 10th, 1923, the French customs line was transferred to the political frontier between France and Switzerland. The Swiss Government protesting against the action, in a note of November 13th, declared that negotiotions had been made impossible and only arbitration could settle the disagreement. Since France, in the note of November 7th, agreed to arbitration, but had not specified the procedure to be taken, the Swiss Government suggested the "procedure recommended by the Covenant of the League of Nations" namely, the Permanent Court of International Justice.[36]

France required two months to answer this note of protest. On January 23rd, 1924, M. Poincaré, ignoring the Swiss notes, demands for arbitration, and suggestions for recourse to the League and Hague Court, again suggested direct negotiation. Switzerland refused, and submitted a draft plan for arbitration. This plan requested that the matter be submitted to the Permanent Court, and formulated the questions to be submitted; namely: whether Article 435 of the Versailles Treaty abrogated the treaties of 1815-16 and, if not, whether France had the right to suppress the zones by a unilateral act.[37] France, in answer to this note requested the Swiss Government to name a jurist to consult with one appointed by the French Government, with the purpose of formulating the text of an arbitral compromise. The French note stated that this concession did not imply that France accepted the whole procedure of arbitration suggested by Switzerland. Nevertheless the jurists were named, M. Fromageot for France and M. Lopez for Switzerland; and there the matter rests.

There is some hope that French policy will become more conciliatory, for M. Herriot is quoted as having made the following statement:[38]

"I will do all in my power to reach a solution favorable to the interests of Switzerland, of the inhabitants of the zone and of France. It is certain that the matter should be settled without delay, and I do not doubt that the Swiss Government will share my views."

THE THREAT OF WAR IN BESSARABIA

The natural boundaries of Bessarabia are the delta of the Danube and the Black Sea on the south, the river Pruth on the west, and the

[35] Full text of the note of October 30th in the *Journal de Genève,* November 1st, 1923; and of the note of November 7th in *Le Temps,* November 8th, 1923.
[36] Text of this note in *Le Temps,* November 13th, 1923.
[37] *Journal de Genève,* February 15th, 1924. [38] *Ibid.,* May 27th, 1924.

river Dniester on the east; this latter separates the province from Ukrainia while the northern point of the territory borders on Poland. It has an area of about 17,000 square miles, and about 2,000,000 inhabitants, 47 per cent of whom are Moldavians, 40 per cent Ukrainians, White Russians and Jews, and the rest Bulgarians and Germans.

Bessarabia was, before 1812, a part of Moldavia, then tributary to Turkey. In 1812, the territory was ceded by Turkey to Russia in the Treaty of Bucharest; after the Crimean War the southern part was returned by Russia to the newly established Kingdom of Roumania, but was again allotted to Russia in the Treaty of Berlin of 1878, and Roumania received the Dobrudja in exchange (a territory on the Black Sea south of the delta of the Danube). In 1917, Ukrainia declared its independence of Russia, and Bessarabia, being cut away completely from Russia by the new Ukrainia, declared itself an independent Moldavian Republic and elected a legislative body called the Sfatul Zerii. With the disintegration of the Russian army, however, deserting Russian troops on their way home from Bukovina overran Bessarabia. The Sfatul Zerii requested aid from Roumania in December, 1917, but Roumania was unable to spare any troops at that time. Conditions grew worse and another request was made early in 1918. Roumania finally sent troops with the avowed object of guaranteeing food supplies for the disbanded Russian troops and the civil population. This fact was communicated by the Italian Minister in Bucharest to the Italian consul at Odessa, who in turn, informed the Command of the Russian revolutionary troops. Thus, no resistance was made to the Roumanian military occupation; and in March, 1918, the head of the Roumanian Cabinet signed an agreement with the representative of the Soviet Government to the effect that the Roumanian troops would be withdrawn within two months. Instead, however, while the military occupation still lasted, on March 27th, 1918, the Sfatul Zerii passed a resolution as follows:[39]

"The Molhdavian Democratic Republic (Bessarabia), bordered by the Rivers Pruth, Dniester, the Black Sea and the former Austrian border line, which had been severed by Russia more than one hundred years ago from the former Moldavia, standing upon its historic right as well as upon its right of kinship, and basing itself on the right of peoples to determine their own fate, joins from now on and forever its mother, Roumania."

[39] *The Nation;* April 30th, 1924.

This resolution was confirmed in November, 1918, when the same assembly voted unconditional adherence to Roumania.[40]

The Treaty of Paris, signed on October 28th, 1920, between Roumania, France, Great Britain and Japan, laid down the frontiers of Roumania, including Bessarabia. At the time Russia protested, but was not heard. Great Britain ratified this Treaty in 1922; France ratified it on March 13th, 1924, and it is in connection with this ratification that the question has become acute. Meanwhile the independent Ukrainia ceased and with it the geographical reason for separating Bessarabia from Russia.

In November, 1923, a meeting took place between representatives of Roumania and Russia at Tiraspol, with the object of resuming consular relations and concluding military and commercial conventions. On this occasion, a further conference was planned, the main subjects of which were to be: (1) the return of the Roumanian State Treasure, removed from Bucharest to Moscow in 1917, by reason of the threatening invasion of Roumania by the troops of the Central Powers; and (2) the question of Bessarabia. The Conference should have taken place in January, 1924, but was postponed until March. Meanwhile, it seems, Roumania requested the French Government to press the ratification of the Treaty of October 28th, 1920, and, as has been stated, the French Parliament ratified the Treaty on March 13th, 1924. Russia protested against the ratification in a telegram addressed to M. Poincaré, but the French answer contented itself with pointing to the will of the Bessarabians expressed in the vote of the Sfatul Zerii.

The Russo-Roumanian Conference was finally held in Vienna, at the end of March, 1924. The first question discussed was that of Bessarabia. The Russian delegation made its statement, namely: Roumania and Russia have not been at war; Roumanian troops occupied Bessarabia at a time when Russia was not in a position to protest against the Bessarabian declaration of independence. Adherence to Roumania was voted when Bessarabia was under Roumanian military control, therefore, this vote should be considered invalid. Russia was not consulted by the Allies when the Treaty of Paris was signed, therefore this treaty was not binding on Russia.

[40] It is claimed by the Russians that the Sfatul Zerii was a provisional organization which was to have been replaced by a constitutional assembly, and thus it had no right to decide the future of the territory. It is also claimed that at the session when adherence to Roumania was voted, not more than one-third of the representatives were present; and that the day after the vote the Assembly was dissolved by a royal Roumanian Decree.

Finally, there had been complaints raised by a Bessarabian delegation which had come to Vienna to state its case and alleged that the country was under a reign of terror. The Russians, therefore, demanded that a plebiscite be held to determine sovereignty over Bessarabia.

The Roumanian delegation answered that Bessarabia had declared its independence from Russia in accordance with the people's right for self-determination; therefore it was not Russian territory which the Roumanian troops occupied and which the vote of the Sfatul Zerii joined to Roumania, and accordingly the Treaty of Paris was valid without Russian signature. Roumania therefore refused to consider a plebiscite. The points of view being irreconcilable, the Conference was discontinued after three meetings. Immediately there were rumours of war, comprising a concentration of Russian troops along the Dniester and attacks by Russian bands; martial law was proclaimed in several towns of Roumania; and a reform of the Bessarabian administration by the Roumanian Government was reported to have taken place. From the mass of conflicting reports one fact stands out clearly, and that is danger of war.

The questions seem to be: Is the Treaty of Paris binding on Russia; and is the declaration of Bessarabian independence made in a free country to be superseded by a declaration of adherence to Roumania, made in a country under Roumanian military control. Although diplomatic negotiations have been discontinued, no effort has been made by Roumania, a signatory to the Court Statute, to have this legal question determined.

JUBALAND AND THE DODECANESE ISLANDS

These two territories, far away from each other and apparently disconnected, were linked up in a conflict between Italian and British interests. Jubaland in South Africa, is the northern corner of Kenya Colony, bordering on Italian Somaliland. The river Juba formed the frontier between the Italian and the British territory. The Secret Treaty of London, of April, 1915, drawn up between France, Great Britain, Russia and Italy, provided in Article 13:

"In the event of France and Great Britain increasing their colonial territories in Africa at the expense of Germany, those two Powers agree in principle that Italy may claim some equitable compensation, particularly as regards the settlement in her favor of the questions relative to the frontiers of the Italian colonies of Eritrea, Somaliland and Lybia and the neighboring colonies belonging to France and Great Britain."

Negotiations concerning the Jubaland frontier were begun in 1919, during the Paris Conference. The British Government made a proposal for a boundary line that took into consideration the situation of the wells (these being of great importance to the natives in these desert territories). The Italian counter proposals claimed a territory about twice the size of that offered by Great Britain. Hitherto, as will be observed, this matter concerned Great Britain and Italy, being a question which resulted from a somewhat vaguely worded treaty.

The Dodecanese are a group of islands, in the Aegean Sea, a few miles off the coast of Asia Minor. Article 8 of the Treaty of London (1915) provides that:[41] "Italy shall receive entire sovereignty over the Dodecanese Islands which she is at present occupying." But in July, 1919, an agreement was made between the Greek and Italian Governments by which Italy ceded all of the Dodecanese Islands with the exception of Rhodes, to Greece. This agreement was confirmed on May 14th, 1920, and it was understood that Italy should return Rhodes to Greece when Great Britain returned the Island of Cyprus.[42] In spite of these agreements the Sèvres Treaty ceded the Dodecanese to Italy (Articles 84 and 122). This contradiction led to an argument between Italy, Greece and the Allied Powers at the Lausanne Conference. In October, 1922, Italy announced that since the Sèvres Treaty and the Tripartite Agreement attached to it were abrogated and the advantages promised to Italy in Asia Minor were thus not to be fulfilled, Italy did not consider itself bound by the agreement with Greece. In Article 15 of the Treaty of Lausanne, Turkey renounced in favor of Italy all rights and title over the Dodecanese Islands.

Greece maintained, even after the Lausanne Treaty, its claim that the Islands ceded by Turkey to Italy should now be ceded by Italy to Greece. Great Britain, jealous of its power in the Mediterranean and protector of Greece, seems to have considered it in the general interest that Greece's claim should be satisfied; but it will be observed that so far this was a matter concerning Italy and Greece, and a question of the respective validity of several conflicting treaties.

At this point, however, the questions of the Jubaland and the Dodecanese merged. In the course of negotiations, Great Britain stated that an agreement on the Jubaland frontier could only be

[41] For text of Treaty of London, see *A History of the Peace Conference of Paris*, Vol. V; pp. 384-393.

[42] *A History of the Peace Conference of Paris*, Vol. VI; p. 31.

reached when Italy consented to a settlement of the Dodecanese question. The British claim was based on the allegation that Italy, itself, in 1920 had agreed to consider the settlement of all outstanding points in the Near East together with the Jubaland frontier; this was denied by Italy, which country claimed that the two questions should be considered absolutely independently. In January, 1924, negotiations were resumed in London, and continued until May when, at last, a compromise was reached. By this compromise the British Government conceded that the Dodecanese question was one to be settled between Italy and Greece, and Italy was satisfied with a territory of 34,000 square miles—somewhat smaller than that originally claimed in Jubaland. The question of right does not seem to have figured in these discussions; for the right of self-determination of the Greek population of the Dodecanese Islands was ignored, as was the right of the Kenya and Somaliland natives to an unhampered approach to their wells. Whether the 1915 Treaty of London is or is not valid, whether some agreements may be considered abrogated and others not, according to the convenience of the various powers concerned, would seem to be a question for a Court of Justice to settle, were the legal points to receive equal consideration with that paid to the political aspects of the question.

THE INTERPRETATION OF THE COVENANT

The Italo-Greek dispute gave rise to a number of legal questions involving the interpretation of Article 15 of the Covenant. It was agreed that these questions were to be treated as theoretical, and not as involving the actual dispute which had been settled by the Conference of Ambassadors. The questions upon which the Council sought a legal opinion concerning its own power were the following: Is the Council, when one of the parties submits a dispute under Article 15 as likely to lead to rupture, to be the judge or may the other party be the judge? (2) May the Council under such circumstances proceed with its inquiry when with the consent of the parties a settlement is being sought through some other channel? (3) Is the objection that a question is domestic the only one upon which the competence of the Council can be challenged? (4) Are measures of coercion which are not meant to constitute acts of war consistent with Articles 12-15 of the Covenant?

It will be observed that these questions were of a legal nature; and that the third question involved a paragraph of the Covenant which the Court had already interpreted. The majority of the Council were

of the opinion that these were proper questions for the Court; but Italy and France were in disagreement. The result was that the Court was set aside in favor of a Special Committee of Jurists and these questions were given a political rather than a judicial interpretation. Furthermore, the Council laid down the principle that it, and not the Court was the proper body to interpret the Covenant and decided that (1) to refer questions of interpretation of the Covenant to the Court would be to deprive the Council of its power; (2) the Court is not the body to settle constitutional questions; (3) when a question referred to the Court has a political as well as a legal aspect, the Council will remain unaffected by anything the Court may say concerning a matter the Council deems to be political. With the exclusion of the Court from the interpretation of the Covenant and with the exclusion of the Assembly, as occurred in this instance (that body being in session when the Council referred the matter to the Special Commission of Jurists), the Council established the precedent whereby it has become the supreme authority upon the meaning and application of the Covenant.

INTERNATIONAL LAW

The Italo-Greek dispute raised one question which was in no way related to the Covenant or to the Peace Treaties. It will be recalled that in a note sent to the Greek Government on September 5th, 1923, the Conference of Ambassadors stated that "it is a principle of international law that states are responsible for political crimes and outrages committed within their territory;" and that Greece paid an indemnity in accordance with this principle. Among the questions discussed by the Council as suitable for legal interpretation was this principle of international law as stated by the Conference. The question was formulated as follows:[43]

"Question 5. In what circumstances and to what extent is the responsibility of a state involved by the commission of a political crime in its territory."

While the members of the Council agreed that this question was a proper one for the Court and was not open to the same objections which were applied to questions interpreting the Covenant,[44] never-

[43] *Verbatim Record of the Fourth Assembly,* Eighteenth Meeting; p. 10.

[44] The Fourth question submitted to the Special Commission of Jurists by the Council concerned measures of coercion not intended to be acts of war, and whether they were consistent with the terms of Articles 12-15. When the Council approved of the opinions of the jurists on March 13th, 1924, Mr. Branting

theless this question was not referred to the Court but to the Special Commission of Jurists appointed by the members of the Council. Their opinion was as follows:[45]

"The responsibility of a State is only involved by the commission in its territory of a political crime against the person of foreigners, if the State has neglected to take all reasonable measure for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal.

"The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf."

The Council has accepted this opinion and presumably the other members of the League will be requested to accept it as international law. The precedent thus created goes to the very foundations of the Court and establishes the Council as the authoritative body to determine international law with the aid of its own selected jurists. No case withheld from the Court carries with it so grave a menace to the sanctity of law as that its interpretation shall be withdrawn from a juridical body and vested in a political organization.[46]

THE INTERPRETATION OF INTERNATIONAL AGREEMENTS

Adherents of the Court of Justice have conceived of it as having two duties: (1) To hear disputes which threaten war, and thereby contribute to the maintenance of peace; and (2) to interpret the Peace Treaties and thereby contribute to the advancement of justice. Under this last category numerous controversies have arisen, among which the following may be noted as not having been referred to the Court.

From the Saar Basin, the League of Nations has received complaints alleging that paragraph 30 of the Annex to Articles 45-50 of the Treaty of Versailles, concerning military service; paragraph 25 relating to civil and criminal courts; paragraph 27 relating to nationality of inhabitants; paragraph 23 relating to new legislation; paragraph 32

(Sweden) regretted that the Commission had not specified the cases in which coercive measures were legitimate or not, and stated that his Government would have preferred that this question be submitted to the Court, as the use of armed force was not compatible with the Covenant in the circumstances specified in the fourth question. Mr. Guani (Uruguay) also regretted that "measures of coercion not intended to constitute acts of war" had not been more precisely defined in the fourth question. *(L. of N. Monthly Summary,* March, 1924, Vol. IV, No. 3; p. 54.)

[45] *L. of N. Monthly Summary,* March, 1924; Vol. IV, No. 3; p. 53.

[46] At the Congress of the Association of the League of Nations Unions at Lyons in July, 1924, Switzerland requested that the question of responsibility of states for political crimes committed on their territories be placed on the agenda. It appears that Switzerland desired a juridical decision on this subject, not being content with the political judgment of the Council.

relating to currency; and paragraph 28 relating to education, were not being administered in accordance with the provisions of the Treaty.[47] The Chairman of the Governing Commission alleged the contrary to be the fact. No hearing has been granted to the complainants and the interpretation of these paragraphs of the Treaty has not been referred to the Court for a judicial opinion.

From Danzig, the League of Nations has received on appeal from the decisions of the High Commissioner, a number of questions which involved the interpretation of Articles 102-108 of the Treaty of Versailles, and of the Polish-Danzig Convention. None of these questions has been referred to the Court of Justice for a legal opinion. Instead, the Legal Section of the Secretariat has been entrusted with the interpretation of these international agreements and with the consequent establishment of the principles of justice.[48]

From the duties laid upon the Council by Treaties, but not comprised within the terms of the Covenant have arisen certain legal questions which seem to require an interpretation of the Treaties in relation to the Covenant. The following are illustrations:

(1) Is the "Council" the League of Nations within the meaning of that term wherein it is used in conventions, treaties and agreements; and may the Council perform the duties laid upon the League without specific approval from member states of the League?

(2) Is the Council bound by the terms of the Covenant in performing duties laid upon it by the Peace Treaties, or when matters are referred to it by the Allied Powers; or does it inherit the authority of the Allied Powers granted to them under the Treaty?

(3) May treaties and conventions, negotiated by a part of the membership of the League, lay duties upon the Council to be performed in the name of the League without the consent of the other members of the League (a) as to duties comprehended within the meaning of the Covenant; (b) as to duties that seem to extend beyond the authority contained in the Covenant?

(4) Are administrative duties conferred upon the Council by conventions between states to be performed in the name of the League of Nations, binding upon member states as to financial support and respect for decisions when undertaken by the Council without the specific assent of these member states?

[47] See pp. 98ff.

[48] In the United States this procedure would be somewhat analogous to the Solicitor of the State Department and his staff interpreting the Constitution, by reason of being authorized to perform certain duties under that instrument.

(5) In the event that the principles of government administered by the Council are contrary to the constitutional forms of government of a respective member what, if any, action may be taken by a member state to reconcile the inconsistencies of its international policy, as practiced by the League Council, with its constitutional practice as carried on by the State government?

Finally, it has been stated in the correspondence between Great Britain and France on the occupation of the Ruhr that the Articles of the Treaty of Versailles referring to reparations and sanctions are in need of interpretation. Great Britain suggested their reference to the Permanent Court, but France refused and the Articles continue to be a menace to the economic life and peace of Europe.

THE CONTRAST

A comparison of the questions submitted to the Court with this partial list of those withheld, indicates that states, signatory to the Court Statute, are unwilling to submit to its jurisdiction their vital interests, including questions of territory and boundaries; minorities and their protection; reparations and their adjustment; [49] and matters affecting state sovereignty—the four leading factors in the wars which have taken place since the Peace Treaties were signed.

[49] The reluctance of the Allied Powers to resort to the Court is again illustrated by their appointment of a committee of Jurists to interpret the Treaty in the matter of reparation. This committee, consisting of M. Fromageot (France) and Sir Cecil Hurst (Great Britain), appointed on July 24th, 1924, reported to the plenary session of the Allied Powers, meeting in London on July 28th, and their opinion concerned (a) the sovereign right of Germany to determine methods of procuring the sums for payment; (b) the powers of the Reparation Commission with reference to the allocation of sources of revenue in Germany; and (c) the application of the Dawes plan. It is not without interest to note that certain signatories to a Treaty thus constituted themselves as the sole interpreters of that instrument to the exclusion of other signatories, even though the questions affected the sovereignty of these other signatories—a vicious principle to establish and one which a reference of the question to the Court would have avoided.

CHAPTER XXXIV

THE PROBLEMS OF SECURITY

From the narrative of the controversies which have disturbed peace and good understanding and which have thereby unsettled the belief in national security which was in the ascendancy when the Peace Treaties were signed, certain menaces to security, which predispose states to war, have emerged. Through the experiences of the past five years, they are the continually recurring factors. Every dispute which has arisen has involved some one or more of them and every settlement has been dictated by their prevalence. Not a conference, nor discussion dealing with controversies affecting peace, however amiable have been the conversations and however polite the resolutions, but has had at the bottom the animating sense of their presence. These menaces, as they have appeared in the foregoing controversies, may be stated as follows:

TERRITORIAL AGGRESSION

The menace of territorial aggression dominates every government of Europe; and the consequent quest for some means of security is predominant. There is no longer any illusion concerning the invincibility of the Peace Treaties to maintain peace; nor of the solidarity among the Allied Powers to maintain order. As for Articles 10 and 16 of the Covenant, they have long since confirmed their failure to guarantee any state against territorial aggression. States therefore are at the mercy of each other; some holding a temporary and precarious advantage; others plotting resources and combinations toward the end that these advantages shall become their own.

This fear of territorial aggression is based upon the realities of the past five years of so-called peace. Turkey was not safe from Greece nor was Armenia from Turkey and Russia; Russia attacked Persia, and Fiume was conquered by Italy; France invaded the Ruhr, the Hungarians invaded Austria; the Yugoslavs on the north and Greeks on the south invaded Albania; Lithuania invaded Memel, Poles captured Vilna; Russia invaded Poland and Poland invaded Russia. Today, these and other depredations are resulting in military alliances, armaments and other preparations for war which indicate Polish fear of Russia and Germany, and French fear of Germany; Czech fear of Germany, Hungary and Poland; Roumanian fear of Russia and Hun-

gary; Bulgarian fear of Yugoslavia; Belgian fear of Germany; the fear of the Baltic States concerning Poland or Russia; and Austria apprehensive of all its neighbors.

Whether it is the French Government in the Ruhr, the Polish Government in Danzig, Italian vessels bombarding Corfu, Belgium ready and willing to take Eupen and Malmedy, Great Britain concerned over the Aaland Island, Yugoslav troops invading Albania, or Poland annexing Eastern Galicia—whatever the dispute may be, behind all of the apparent and superficial reasons lies the craving for territorial security. A wise and statesmanlike solution of economic or social questions, demanding the attention of nations, is not possible in the face of this national fear which pervades Europe.

But it is not alone Europe. The fear of territorial aggression is spreading. In Asia there is friction based upon the same territorial insecurity: China in fear of encroachment and the mandated Arab territories in fear and distrust of their mandatories. While Africa presents a more backward stage, the strivings for territorial security are apparent and questions like that of Tangier and the settlement of the Jubaland frontier indicate the territorial jealousy on that continent of the European powers.

The settlements of disputes as they affect territorial questions have not been of an order to allay this fear; on the contrary they have but increased the sense of insecurity. The Treaty of Versailles proclaimed a neutral administration of the Saar Basin under a trusteeship, with a plebiscite in 1935; the people have received a French administration from their trustee. Danzig was declared to be a Free City; its people now constitute a political, economic and military dependency of their enemy state, Poland. Upper Silesia in the Treaty was guaranteed a plebiscite; as a result its inhabitants find many of the necessities of life disrupted in disregard of it. Fiume was created a Free State; it has been annexed to Italy. Turkey was made a vassal state; it tore up a treaty and by war won its liberation. Lithuania was promised a port; it had to resort to an insurrection to obtain it after a delay of four years. Albania had its boundary fixed by the Treaty of London in 1913; it endured invasions and bloodshed for many months before its claim was recognized and even today its frontiers are subject to continuous attacks. Lithuania claimed and was conceded possession of its capital, Vilna; but before the signed agreement could become effective, a Polish army captured and kept the territory. Poland was allotted Russian territory without consulting Russia; a disastrous war was the result. Bessarabia was taken from Russia and given to Roumania;

unless there is a plebiscite there may be war. Eupen and Malmedy were promised the right of self-determination; 60,000 silenced people have been transferred to Belgium. Hungary appealed to the League for a rectification of boundaries. In one instance the rectification did not take place; in another a village was regained at the cost of economic advantage in undisputed territory; but by war it regained a part of the Burgenland. Beautiful old Teschen withstood the invasion of centuries; it is now carved up to satisfy the insatiable thirst of new states for power and security.

As against these methods of settling territorial questions where is there evidence of an act of rectification which has not been forced from the guardians of the Treaty by threats of war, by reprisals, or by batter? What dispute, involving a boundary line, has been sent to the Court of Justice for a judicial decision? What question that was not intended to facilitate war has been sent to it for a judgment? There is none discernible, and none will be so long as these states fear for their own security.

A careful discrimination of the forces involved in the foregoing disputes and their settlement reveals the fact that as inevitably as night follows the day, regardless of a loan here and there, of a palliative or minor correction, or of petty adjustments, or of the over-organization of machinery, war will be resorted to in order to restore the balance of security among nations, unless another way is found. Geneva is a fool's paradise. Those who would understand the forces at work in Europe must visit the broken and twisted frontiers that violate every known principle of geographic, economic and racial homogeneity; must observe the countries with too many ports and the countries with none; must see the intersected railways and cut canal systems, and "internationalized" waterways, to understand the bitterness of simple people who live alongside them; must observe the Allied commissions saddled upon states at their expense, living in luxury and comfort among starving people; and must follow the investigations and inquiries and reports that thread their way through state pride and sovereignty.

States will tolerate these economic obstructions, these commercial barriers, these infringements upon sovereignty, these insults to national pride, just up to the point where they can muster force or make a combination to overthrow them. It is inevitable that so long as boundary lines remain as strategic monstrosities; so long as some states have more ports than they need and others none; so long as waterways and natural communications are intersected and internationalized in the interests of a few; the struggle will not cease for their restoration to more natural

laws. So long as boundary lines run through cities and railway stations and dwelling houses and separate industries and their natural connections, nations will live in fear and plan war. Some of these territorial abnormalities have already been righted by force, namely, in the Baltic Sea and in the Dardenelles. It is simply a question of how rapidly nations can gain strength in order to right their particular grievance and this ambition must be satisfied by war so long as no pacific way is found to (1) assure security to states in the possession of what they have; (2) to provide means of the rectification of racial, economic and geographical injustices and (3) to provide peaceable means by which the boundaries of the future may be changed by the will of the people.

THE OPPRESSION OF MINORITIES

The presence of fifty million people of alien races in states not their own is at once a menace to territorial security and a tremendous administrative problem for states. No state is safe with these unassimilable elements within it in a condition of oppression or subjection. Unlike the emigrant to a new country, these people are not readily assimilable; they live on the land of their forefathers in the midst of traditions and associations and resent even the well meant intentions of their new overlords to change them.

Americans hardly realize the extent of this evil which the Treaty of Versailles perpetrated. Millions of oppressed people have been liberated by the war — Alsatians, Czechs, Poles, Slavs, Latvians, Finns and Esthonians. But their freedom has been bought by the enslavement of millions of other people—Armenians and Georgians under Russia; Hungarians under Roumania, Yugoslavia and Czechoslovakia; the Fiumians and Tyrolians under Italy; Lithuanians, Ukrainians, Germans and White Russians under Poland; Germans under Belgium; Germans under Czechoslovakia; Ukrainians under Roumania; and the Aaland Islanders under Finland.

Other peoples have but changed masters—the Germans in the Saar and Ruhr from German militarism to French militarism; the people in mandated countries from the rule of Germany and Turkey to that of Great Britain or France; the Croats, the Dalmatians, Bosnians, Herzegovinians and Montenegrins from Austria-Hungary to Serbia. It is upon force that the liberated peoples rely to preserve their freedom; it is toward war that the oppressed turn to win liberty. These peoples, imprisoned under alien rule through the will of the Peace Conference, are excluded from the Court of Justice by the political manoeuvres of the League. They threaten the security of Europe. Turkey has real-

ized the peril and is expelling from its boundaries peoples who would be either a cause of war or a source of weakness in the event of war.

The settlements of the difficulties which must arise from the injection of these alien elements into a state have not contributed to stability in Europe. In Poland, the Eastern Galicians were promised autonomy and were annexed to Poland; and are now unable to obtain a hearing from the League; White Russians are in a ferment; and German settlers received a few hundred dollars compensation after being evicted from their homes, while further evictions are reported to be planned. Some eight million of Poland's new subjects comprise minorities. Italy was not required to sign a minority treaty and has discontented Germans in the Tyrol and Croats in its new Adriatic possessions. The Hungarian optants in Transylvania have been the victims of a Roumanian agrarian law, in which situation the League has failed. The residents of Eupen and Malmedy have, by the grace of the League, passed under alien control; and the Aaland Islanders failed to obtain release from Finland. The division of Upper Silesia transferred Poles to German rule and Germans to Polish rule. The Dalmatians and Croats and Macedonians are an unhappy and turbulent people under the Serbs, as are the Lithuanians in Poland and the Ukrainians in Bessarabia. Great Britain alone seems to have been able to secure adequate protection for British subjects in Tunis and Morocco.

In the present state of affairs, minorities are in the absolute power of the governing majority or minority as the case may be. The League of Nations has found that state sovereignty bars its way to the execution of any effective measures for protection and has gracefully yielded in its procedure to this ascendancy, going to the extent of withdrawing information concerning complaints, from its member states. The minorities have no representation in the League and can only receive consideration through the kindness of some member of the Council, bringing the matter to the attention of that body. The Council and Assembly consist of representatives of governments and the Secretariat is appointed with the express approval of governments. Therefore, the opposition of a state in the Assembly and of its friends in the Council can indefinitely delay action. The cutting off of publicity concerning complaints from minorities protects the governing state from the moral influence of an informed public opinion; and the Secretariat is limited in its initiative and independence. The business of a representative of a state in the League is to look after the interests of his government, not to promote justice for a troublesome minority. It has therefore become the custom of the Council to express confidence in the govern-

ment concerned rather than to inquire into the actual condition of minorities. The Allied Powers responsible for the creation of these minorities have refused to take independent action under the Treaties and as signatories to appeal to the Court of Justice, the jurisdiction of which certain states have accepted. In no instance has such an appeal been made.

Irrespective of a first aid here and there to these people, which is significant only because the facts concerning complaints are withheld, it is apparent that plans of the Allied Powers to protect minorities have miscarried and there is need for a system of protection, unless it is to be sought through war by states endeavoring by means of the use of force to relieve the intolerable burden under which their nationals live. By the limitations placed upon emigration from European states by immigration states in 1924, this danger is vastly increased.

REPARATIONS

The imposition of unreasonable reparations without estimates of loss or of the ability of nations to pay is a menace to security. A Reparation Commission, with apparently unlimited powers, was satisfied with drawing up a statement of reparations due to the Allies without examining the capacity to pay of the country concerned. This neglect has led to the use of force and to the result that France and Belgium, owing to their policy in the Ruhr, are less likely to receive full reparations than they were before their resort to force. Great Britain can hardly collect any reparations unless France and Belgium are first satisfied, and is making efforts to change French policy and to replace the Reparation Commission by some other body so as to secure its share of reparations. The spectacle of countries making loans to bankrupt states to enable them to pay reparations—as in the cases of Hungary and Austria—the latter not possessing the economic factors for permanent reconstruction, is but another of the anomalies. States reduced to a condition of economic slavery to advance the interests of other states, as Bulgaria, are a menace to security. Whenever the educational facilities of a country are starved, its youth underfed and neglected, and its civil service demoralized, because peace burdens consume a third of the budget of a country, there is the making of future war. Into the merits of these particular questions this discussion does not enter. It but points out that the history of the past five years indicates that the subject of reparations is a cause of war whenever and wherever relief is not provided by law, and that states will bear the burden precisely up to the point when they become strong enough

to throw it off by force—as Turkey did and as Greece threatened to do; and that force will be the method resorted to unless the question of reparations now and for the future can be reduced to principles of international law.

The tendency, shown in the Treaty of Mutual Assistance, in the Treaty of Security and Disarmament and in other schemes to bring states into an agreement to pay the costs of war, is premature, in the absence of any international regulations governing such matters. The experience of states under the Peace Treaties appears to have been such that they and others will hereafter require the most explicit definitions and specifications concerning such costs, their method of assessment, revision and the like, before making in advance a voluntary assignment of their assets.

STATE SOVEREIGNTY

In addition to territorial, racial and economic security, there remains the question of political security which may be expressed in terms of state sovereignty—that is, the preservation of domestic rights which provide for the defense and development of a state. When this supreme authority of a state over its own people and territory becomes impaired that state becomes either a vassal state or it prepares for war or enters into combinations to make war. Without the Treaty of Sèvres, the Turkish Nationalist Movement might have failed and Greece been victorious; for the height of infringement of soverignty was reached in that Treaty.

The settlement of the disputes before the League is the narrative of a struggle between the Council of the League of Nations in the acquisition of power and the resistance of the states to that power. It is the narrative of the supreme sovereignty of a few states and the tributary adherence of other states to the instrument of that sovereignty. This struggle began with the Assembly of 1920. It will be recalled that the Covenant contained no declaration of the rights of states, and therefore the Allied Powers carefully reserved the actual powers to the states, constituting the Council an advisory body, except in the instances wherein they invested the Council with executive, legislative and judicial duties under the Treaties which they control. At the same time in Article 17 they attempted to impose upon non-member states obligations which they would not accept for themselves. Thus, states appeared to give up their right to aggress territory, but it has not so materialized; they appeared to give up their right to make war, but this right has been exercised; they appeared to agree to wait three

months before resorting to a war after an award, but they seem to have forestalled the award; they appeared to have agreed to register treaties, but this does not seem to apply to technical chapters under which war is to be made; they appeared to agree to a review of treaties, but it seems only on the invitation of the signatories; they appear to have agreed not to make agreements not consistent with the Covenant, but regional understandings were exempt and these seem to comprise any combination which member states may wish to make.

State sovereignty continued its struggle for recognition in the matter of amending the Covenant. Small and neutral states undertook to impress upon it their views and peace ideas. In 1920 they realized that they were to uphold and enforce the Covenant created by the Peace Treaties and to contribute their support. They learned that it was an instrument which all should respect but with which they might not tamper. The right to amend they possess, but it is controlled through the vote of the Allied Powers.

State sovereignty was more successful in the matter of territorial aggression. No state has exercised its friendly right to call the attention of the League to an aggression of territory, knowing full well that such an act would not be regarded as a friendly right when the states concerned in such aggression did not submit the matter but preferred measures of force to mediation.

In the matter of the submission of disputes to inquiry, each state has held that its consent was necessary and no disputes have been settled under this article because of the effective opposition of one or other of the parties, which opposition reached its height in the Italo-Greek dispute. The interpretation of the Commission of Jurists concerning the five questions arising under that dispute broadens the powers of the Council, and awaits either the action of the Assembly or the action of a state to raise the question of its legality whenever its application is undertaken.

The endeavor of the Council to increase its hold over the sovereignty of member states has been seen in the attrition to itself of the settlement of disputes; in the exercise of a monopoly over advisory opinions; in the control of the admission of states; and in the practice of making investigations upon which decisions are based. The assumption by the Council of the duties of the "League" in instances where that body is specified is typical of its endeavor to concentrate power in ten sovereign states at the expense of forty-four other sovereign states.

While the effort of the Council to impose restrictions upon state sovereignty has for the most part failed, the infringement upon sov-

ereignty undertaken in the Peace Treaties is of an order to provoke war. The regulation of armaments, the political supervision of domestic and foreign affairs, the rights of investigation, the imposition of commissions of control are futile measures of security. For it is fundamental that whenever and wherever one state projects its control or interference into the domestic affairs of another state there is the making of war not peace and the controversies will continue and the wars will go on until the balance of state sovereignty has been restored among states. And whenever the Council undertakes supervisory activities it enters at once into relationship with a state which impairs its usefulness as a body of mediation. Such measures may provide temporary assurance by delaying the recovery of the state to the point where it forcibly will reassert its sovereignty but it is only a question of time and of new alignments among states. It were wise to create substitutes for the present forms of control which breed war; and to find more constitutional methods of adjusting the disputes arising under these forms of control.[1]

In support of this observation there is the Lausanne Treaty. The student of these forms of control has but to compare the Treaty of Sèvres with that of Lausanne to ascertain at once the points of imposition on sovereignty and the compromise due to a successful war. The Latvian, Esthonian and Lithuanian States have had regulations concerning minorities imposed upon them, not required of other states seeking membership in the League, and they have now combined to act together as a unit in the League itself. Albania suffered a like indignity and other measures of intervention, and by revolution has created a new government and has freed itself from the financial advisor recommended by the League.

THE MACHINERY OF PEACE

If territorial aggression, oppression of minorities, unreasonable reparations, and infringement upon state sovereignty are the causes of insecurity and stimulants to war, the question arises whether the existing peace machinery has proved adequate to the task? As has been seen, friction within the Conference of Ambassadors has delayed and imperilled and prevented just settlements. The competition of the Conference with the League over jurisdiction, has enhanced political settle-

[1] There is ample evidence that small states realize that unimpaired sovereignty is the strength of their political defense upon which they must rely for security. The question therefore arises in each controversy as to what are the matters inherent in state sovereignty which may be the subject of international control.

ments; the competition of the Council with the Court has supplanted judgments at law by advisory opinions.

The future work of the Conference in the settlements of controversies was expressed by Premier MacDonald on June 30th, 1924, as follows:[2]

"The Ambassadors' Conference met three times during the month of May. The following questions were raised:—Military control in Germany, Austria, and Hungary; the Memel Convention and establishment of full diplomatic relations between the Allied Governments and Lithuania; the Albanian frontiers; Polish-Czechoslovak frontier; Hungarian Yugoslav frontier; the expenses of the German-Czechoslovak Boundary Commission; registration with the League of Nations of documents issued by the various boundary commissions; the allowances of members of the German-Polish Boundary Commission; the allowances of members of the Military Control Commission in Germany; disposal of funds derived from the Upper Silesian Plebiscite Commission; sale of German war material in Holland; costs of Armies of Occupation in Bulgaria; distribution of Anglo-Hungarian rolling stock; the accession of the Dutch Government to the modifications made in the Mannheim Convention by the Treaty of Versailles; organization of the Inter-Allied Commission at Sofia; repatriation of Ukrainian emigrants; disposal of a powder depôt in the occupied territory; rights secured by the Grand Duchy of Luxembourg by Article 41 of the Treaty of Versailles; archives of the territory of Eupen and Malmedy; the share of the German Government in the Danzig Bauernbank; claims of certain Allied nationals on the gold owned by German banks and seized in Turkey by the Allied Governments. * * * Practically in every one of these cases a settlement was come to. * * * The Ambassadors' Conference is charged with the winding up of a variety of small matters that issued from the application of the Treaty of Versailles, and it will be strictly confined to that. * * * When the Ambassadors' Conference is wound up undoubtedly they will be dealt with by the League of Nations. * * * No great questions of an independent character have been referred to the Conference."

In the event that this prediction proves correct, both the Council and the Court may be expected to be the beneficiaries, the former in increased executive duties under the Treaty and the latter in the interpretation of the Treaty. But the assent of France to a reduction of the authority of the Conference is by no means assured, and efforts to bring this about may well become another source of difference between Great Britain and France.

It will be recalled when the Covenant was adopted that it was objected to by Mr. Root as having no foundation of law. The part taken by the Council in the settlement of disputes has fully justified this fear; for the Council instead of upholding legal principles and the sanctity of Treaties has at times broken them down. In condoning the

[2] London *Times*, July 1st, 1924.

division of duties made by the chairman of the Governing Commission of the Saar, it broke down the established principles of commission government. In becoming a beneficiary under its own decisions, as in the matter of the Aaland Islands and Memel, it destroyed the integrity of the juridical principle which holds that a tribunal should not profit from its own decisions. In denying to the people of the Saar a hearing during an inquiry in which but one side was heard, the Council attacked a fundamental principle of the jurisprudence of all civilized States in the administration of justice. In its failure to protest against the expulsion of Saar inhabitants from territory not under its jurisdiction the Council condoned a breach of international law. In authorizing the policing of territory under its civil administration by soldiers of a neighboring state—as in Danzig—and the establishment of courts martial by decree of its Governing Commission—as in the Saar—it infringed upon the principles of a civil administration with which it is concerned. In the suppression of free speech and of picketing, by the Saar Governing Commission, the Council tolerated an attack upon the fundamental principles of democratic forms of government. In acquiring jurisdiction under Article 15 of the Covenant over the Aaland Islands dispute as an international question; and then upon finding it to be domestic, making a recommendation, the Council failed to maintain the integrity of the Covenant. In permitting the use of the good name of the League to validate the transfer of Eupen and Malmedy, the Council did not scrupulously maintain the integrity of the Treaty provisions.

THE RESORT TO ARBITRATION

In view of the foregoing record it is not surprising to find that arbitration during the past five years, as a method of settling disputes, has fallen into disuse. It will be recalled that the Covenant prescribes three procedures for settling disputes. The first is a kind of mediation under Article 11. The Council has considered thirteen disputes between states under this Article, and settled four. These disputes have, however, been settled, not according to the rules of arbitral procedure, nor in observance of its principles; but according to any method which the Council found adapted to its use. It cannot, therefore, be said that the arbitral system established at The Hague in 1907 has either been sustained or that it has gained through these controversies; on the contrary it appears to have deteriorated from that standard.

The second procedure is arbitration, as prescribed in Articles 12, 13 and 14. Under these articles the Council received the following disputes between states: The Italo-Greek controversy and the Eastern

Carelian case and the Nationalities Decrees in Tunis and Morocco which the parties would not permit it to settle; the Polish-Czechoslovak frontier, the German settlers in Poland and the acquisition of Polish Nationality which it has settled. The Council was assisted in five of these cases by a legal opinion from the Court of Justice. That part of the procedure which was conducted by the Court observed the principles of arbitration, but that part which was not before the Court did not—therefore it may be said that each of these five instances, wherein an opinion was rendered, contained an arbitral link in a chain of conciliatory processes, conducted by the Council under Articles 12 and 13. It can hardly be said that this method of settling disputes has advanced the system of arbitration. In one instance, however, that of the S. S. Wimbledon, the arbitral system was fully upheld under a compulsory jurisdiction clause in the Treaty.

The third procedure for settling disputes is inquiry and reports to be made by the Council under Article 15. No jurisdiction was had by the Council over any dispute between states under this Article, although the Polish-Lithuanian dispute followed a course of inquiry under no specified article. It can hardly be said therefore that arbitration, as conceived at The Hague in 1907 and set forth in the Convention for the Pacific Settlement of International Disputes has played a conspicuous part in the preservation of peace; nor has the newer process of conciliation, proceeding by less formal and not generally acknowledged rules of procedure, been productive of actual benefits to justice

It may be said that in this brief statement of the problems of peace, as revealed by the controversies, sufficient allowance has not been made for the intangible power of moral influence operating through the processes by which results were eventually achieved, as, for instance, when the Conference of Ambassadors settled the Italo-Greek dispute. It is impossible in a record of fact to deal with any such intangible substance, which is claimed by some and denied by others and concerning which there is no material evidence. Moral influence is not always of a pure quality and may sometimes be perverted in the interests of peace at the expense of justice. Such influence is, therefore, no substitute for the orderly processes of law nor for juridical and arbitral tribunals through which course alone justice is assured and peace eventually maintained.

Territorial insecurity in fact and in apprehension; the reaction to state sovereignty from international control; the plight of minorities; and the difficulties over reparations are of a nature sufficiently grave to cause European countries to seek for a remedy to meet the menace

of new wars. It is the purpose of the following chapters to examine the proposals made in Europe with reference to their competence to reach these fundamental problems of peace; and to examine the policy of the United States with a view to its extension in the prevention of war. For any plan for peace which is not addressed to one of these elements of security—territorial, racial, economic and political—is of little immediate practical moment to peoples in the grip of the fear of invasion, under the yoke of oppression, burdened with reparations; or suffering infringements as to their domestic affairs.

CHAPTER XXXV

THE AMERICAN PEACE POLICY

Before the war, the peace policy of the United States was embodied in two main ideas, the Monroe Doctrine and the Pan-American movement on the American Continent; and the Hague Peace Conferences and treaties of arbitration with foreign states. The Monroe Doctrine is the cardinal principle in the former and arbitration the central theme of the latter. It is now proposed that to these two principles there be added a third, namely, participation in European political affairs through membership in the League of Nations System. The following discussion is a comparative analysis of the three policies.

THE MONROE DOCTRINE BEFORE THE WAR

The Monroe Doctrine is the national security policy of the United States. It originated in 1823 from a threat of aggression, arising from the Holy Alliance of 1815, formed by the sovereigns of Austria, Prussia and Russia to enforce the divine right of kings, and to put an end to representative governments. This Alliance was instrumental in restoring Ferdinand VII to the throne of Spain, whereupon the Latin American countries in South America revolted against Spanish rule.[1] Spain proposed to appeal to the Alliance for aid in the suppression of the revolt. This proposal brought the threat of a foreign invasion to the western hemisphere. The United States had already recognized a number of the new republics and was concerned over the prospect of a foreign invasion.

A second event which aroused the United States Government was a ukase issued by Czar Alexander I of Russia in 1821, prohibiting foreigners from carrying on commerce and navigation in the Northwest Territory of North America down to the fifty-first parallel of north

[1] That apprehension of a revival of the Spanish danger still persists in certain quarters is indicated by press dispatches under date of March 19th, 1924, in which it is stated that part of the new Spanish-Italian understanding is the creation of a United States of South America to be federated with Spain. As part of the program some 100,000 Spanish military refugees living in South America are to be pardoned; and North American imperialism is being accentuated and efforts made to draw South American countries closer to the League as their natural protector. However chimerical may be such reports they nevertheless call attention to under-currents of political thought and ambition which call for greater vigilance in keeping peace in the western world. See also Chap. XX; p. 372, for activities of the League of Nations with relation to South American questions.

latitude, covering territory claimed by both the United States and Great Britain. Before a definite policy was declared by President Monroe, the question of interference by European Powers with American affairs was the subject of correspondence between Mr. Jefferson and the President, in which the former stated the following principle:

"Our first and fundamental maxim should be, never to entangle ourselves in the broils of Europe. Our second, never to suffer Europe to intermeddle with cis-Atlantic affairs.

"America, North and South, has a set of interests distinct from those of Europe, and peculiarly her own. She should therefore have a system of her own, separate and apart from that of Europe."

In his annual message to Congress on December 2nd, 1823, President Monroe informed Congress that the rights of the United States in relation to Russia were in process of amicable negotiation, but he added:

"In the discussions to which this interest has given rise, and in the arrangements by which they may terminate, the occasion has been judged proper for asserting as a principle, in which the rights and interests of the United States are involved, that the American continents, by the free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization by any European powers." [2]

Another paragraph in the message which laid down the principles of American foreign policy was the following:

"In the wars of European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. * * * The political system of the Allied Powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments. * * * We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the Governments who have declared their independence, and have maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an un-

[2] Before sending his message to Congress, President Monroe on July 17th, 1823, had informed Baron Tuyl, the Russian Minister:

"That we should contest the right of Russia to any territorial establishment on this continent, and that we should assume distinctly the principle that the American continents are no longer subjects for any new European colonial establishments."

friendly disposition toward the United States. In the war between these new Governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security. * * *

"It is impossible that the Allied Powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can any one believe that our Southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. * * * It is still the true policy of the United States to leave the parties to themselves, in the hope that other powers will pursue the same course."

The fundamental principles laid down in this message were three: (1)not to take part in wars among European powers in matters relating to themselves. (2) Not to tolerate the extension of the European political system to any portion of the western hemisphere. (3) Not to interfere with colonies or dependencies of any European power but whenever a government has declared its independence and maintained it, to recognize it and view as an unfriendly act, any interposition to oppress it or control its destiny. The Monroe Doctrine was thus established as one of national security and therefore this country reserves the full right to define, interpret and apply it; and has never been disposed to enter into any treaties or engagements which would limit this right or give the Monroe Doctrine the character of an international understanding.[3] Subsequently there have been various interpretations of these fundamental principles confirming this position, among which may be noted the following:

In October 1825, Henry Clay, Secretary of State to President John Quincy Adams, and acting under the direction of the latter, was concerned that Spain would transfer part of her Caribbean possessions to France. He notified the French Government that the United States would not consent to the occupation of Cuba and Porto Rico "by any other European power than Spain under any contingency whatever." Similar declarations were made to the other European Powers, in the belief that France might seek to establish sovereignty over these possessions.

On December 2nd, 1845, President Polk, in his annual message

[3] See also "Observations on the Monroe Doctrine," by Charles Evans Hughes, *Am. J. Int. Law,* October, 1923. "One Hundred Years of the Monroe Doctrine," by Henry Cabot Lodge, *Scribners,* Vol. LXXIV; pp. 413-23; "The Future of the Monroe Doctrine," by "C," in *Foreign Affairs* (American); March, 1924.

declared that, while existing rights of every European nation should be respected, it

"is due alike to our safety and our interests that the efficient protection of our laws should be extended over our whole territorial limits and that it should be distinctly announced to the world as our settled policy that no future European colony or dominion shall, with our consent, be planted or established on any part of the North American continent."

In his first annual message of December 6th, 1869, President Grant emphasized the position taken by Henry Clay, as follows:

"These dependencies are no longer regarded as subject to transfer from one European power to another. When the present relations of colonies ceases, they are to become independent powers, exercising the right of choice and of self-control in the determination of their future condition and relations with other powers."

These statements of policy were reiterated by President Grant in his special messages on May 31st, 1870, and on April 5th, 1871, concerning the Annexation of the Dominican Republic; on June 13th, 1870, concerning the revolt in Cuba; also by President Hayes in a special message on March 8th, 1880, regarding the Isthmian Canal. President Harrison, in his inaugural address, on March 4th, 1889, said:

"We have happily maintained a policy of avoiding all interference with European affairs. We have been only interested spectators of their contentions in diplomacy and in war, ready to use our friendly offices to promote peace, but never obtruding our advice and never attempting unfairly to coin the distresses of other powers into commercial advantage to ourselves. We have a just right to expect that our European policy will be the American policy of European courts."

In a special message on December 17th, 1895, President Cleveland, referring to the Venezuelan Boundary dispute, stated:

"The dispute has reached such a state as to make it now incumbent upon the United States to take measures to determine with sufficient certainty for its justification what is the true divisional line between the Republic of Venezuela and British Guiana. The inquiry to that end should of course be conducted carefully and judicially. * * * When such report is made and accepted it will, in my opinion, be the duty of the United States to resist by every means in its power, as a wilful aggression upon its rights and interests, the appropriation by Great Britain of any lands or the exercise of governmental jurisdiction over any territory which after investigation we have determined of right belongs to Venezuela."

The President also instructed Secretary of the State Olney to make the following statement:

"No European power or combination of European powers should forcibly deprive an American state of the right and power of self-government and of shaping for itself its own political fortunes and destinies. * * * Today, the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition." [4]

President Roosevelt, in his annual message of December 3rd, 1901, re-defined the policy as follows:

"The Monroe Doctrine is a declaration that there must be no territorial aggrandizement by any non-American power at the expense of any American power on American soil. It is in no wise intended as hostile to any nation in the Old World. * * * This Doctrine has nothing to do with the commercial relations of any American power, save that it in truth allows each of them to form such as it desires. * * * We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power."

President Wilson, in his address before the second Pan-American Scientific Congress in 1916, made the last official interpretation by a Chief Executive of the Nation, when he said:

"The Monroe Doctrine was proclaimed by the United States on her own authority. It has always been maintained, and always will be maintained upon her own responsibility."

The Monroe Doctrine, thus formulated, interpreted and applied, by successive Presidents of the United States, has been the consistent defense policy of this country, accepted with reluctance and sometimes with resentment by European powers, but fully recognized and respected. This peace policy is something more than the pronouncement of statesmen. It has become part of the national thought of the country, and of the instruction of its youth; and of the traditional knowledge of this country. Around it has grown up a popular sentiment, an assurance of safety, and a respect for the foresight and wisdom of its creators, which Americans are loath to relinquish for general or vague assurances of protection which do not emanate from themselves. Rightly or wrongly, wisely or unwisely, encroachments on this policy or alterations in its character are resented because the

[4] This position has been reaffirmed in the arbitration between Great Britain and Costa Rica concerning concessions granted on June 25th, 1918, under the Aguilor-Amory Contract. On March 7th, 1923, these two countries ratified a treaty of arbitration. The Treaty provided for a single arbitrator and William H. Taft was chosen as that arbitrator and delivered his opinion on October 18th, 1923. As this Treaty was made in 1923, either of The Hague Courts could have been named but Great Britain preferred to recognize the United States. (For details of the controversy see *Am. J. Int. Law*, January, 1924; p. 147.)

teachings of Monroe, Jefferson, Cleveland, Roosevelt, Knox and scores of other Americans have found deep root in American life, especially in the west and middle west which now dominate the national policy of the country. Therefore, it may be truly said that it is with the people themselves that American statesmen must reckon whenever they propose measures which appear to infringe upon the traditional policy.

THE PEACE TREATY AND THE MONROE DOCTRINE

Such an infringement, it is believed, was undertaken when the United States Senate was requested by President Wilson to ratify the Treaty of Versailles, which Treaty, in the view of the Senate, did not sufficiently safeguard traditional American policy. As a result of American participation in the war, and preceding the submission of the Treaty, the idea had developed that the Monroe Doctrine could be made universal and would bring to Europe the peace which it had insured in the western hemisphere. On this point, in an address before the United States Senate, on January 22nd, 1917, Mr. Wilson said:

"I am proposing, as it were, that the nations should with one accord adopt the Doctrine of President Monroe as the doctrine of the world; that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid—the little along with the great and powerful."

The leadership of Mr. Wilson created two schools of thought—those who believed that the principles of the Monroe Doctrine could be made universal; and those who believed that they were peculiarly inherent in the conditions of western civilization. To the latter school, a majority of the members of the Committee on Foreign Relations of the United States Senate belonged and it was upon the subject of ratifying the Treaty that the division of opinion became clear. Senator Knox, one of the leaders during the debate, said:[5]

"The Monroe Doctrine is not an international engagement, nor is it a regional understanding; these are reached by agreements between nations. It is a policy of the United States. Its precise character, the extent, method and time of its application, the means of compelling its observance, are all matters of our high and uncontrolled will and sovereign prerogative. We, the United States, cannot answer to anyone else in respect of it. We use it when and as to the extent we need it. There can be no limitation upon it except our requirement, our will and our force of arms. Whatever security we may need within its purview it must give if we ask it. * * *

[5] *Congressional Record,* 66th Congress, 1st Session, June 17, 1919.

Senator Lodge included among the fourteen reservations, the following concerning the Monroe Doctrine:[6]

"The United States will not submit to arbitration or to inquiry by the Assembly or by the Council of the League of Nations, provided for in said treaty of peace, any questions which in the judgment of the United States depend upon or relate to its long-established policy, commonly known as the Monroe Doctrine; said Doctrine is to be interpreted by the United States alone and is hereby declared to be wholly outside the jurisdiction of said League of Nations and entirely unaffected by any provision contained in the said treaty of peace with Germany." [7]

Although an advocate of the United States becoming a member of the League, Mr. Root suggested the following reservation:[8]

"Inasmuch as in becoming a member of the League the United States of America is moved by no interest or wish to intrude upon or interfere with the political policy or internal administration of any foreign State, and by no existing or anticipated dangers in the affairs of the American continents, but accedes to the wish of the European States that it shall join its power to theirs for the preservation of general peace, the representatives of the United States of America sign this convention with the understanding that nothing therein contained shall be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions or to require the submission of its policy regarding such questions (including therein the admission of immigrants) to the revision or recommendation of other powers."

On behalf of this reservation, Mr. Root argued that it made certain and definite what other provisions, already inserted in the Covenant, contained about the Monroe Doctrine. He held that clarity was neces-

[6] *Ibid.*, November 19, 1919.

[7] In 1921, at the meeting of the Second Assembly of the League of Nations, the Czechoslovak delegation proposed the following amendment to the Covenant which was, however, not adopted:

"All agreements between two or more Members of the League the object of which is to define or complete the engagements contained in this Covenant for the maintenance of peace or the promotion of international co-operation, may be not only approved by the Council or the Assembly, but also promoted by these bodies and negotiated under their auspices. These provisions may also be applied to international engagements such as treaties of arbitration, to supplementary conventions intended to extend the jurisdiction of the Court of Justice, to regional understandings like the Monroe Doctrine, or to any other engagements which, in the opinion of the Council or the Assembly, conform to the conditions of the first paragraph of this Article.

"For such purposes the Council or the Assembly may, provided that a sufficient number of Members of the League submit a request to that effect, summon special conferences which may be attended by all Members which consider that their interests are involved." (*Official Journal*, May, 1921; p. 252.)

[8] *Congressional Record*, 66th Congress, First Session, June 23rd, 1919.

sary, not only for the United States, but for the world, and that no one could take exception to such simplification. He believed that some definite statement was necessary in relation to the position of the United States toward matters of purely local interest, because of the impression which had gone out, by reason of the activities of the United States representatives in Paris, that this country was abandoning its traditional policy of non-interference in European matters.

The refusal of the Senate to ratify the Treaty without such a reservation, and the refusal of the President to accept it created the divergence of opinion which now characterizes American foreign policy. The effort to substitute the League of Nations for the Monroe Doctrine has been actively supported by leading statesmen and organizations. One of the arguments followed the suggestion of Mr. Wilson that the Monroe Doctrine should be made universal and pointed out that Article 10 of the Covenant covered the territorial guarantees of the Monroe Doctrine. Senor Alvarez, the Chilean jurist, has however pointed out four important conditions to which Article 10 does not apply:[9]

"(1) It does not forbid a State to cede voluntarily a part of its territory or to place it under the protectorate of another State, whereas the Monroe Doctrine precludes any such transaction between an American and an extra-Continental State.

"(2) The Covenant does not abolish war nor prevent a vanquished State from ceding a part of its territory to the victor, whereas according to the Monroe Doctrine no American State may cede any of its territory following a war to any European State.

"(3) Article 10 does not forbid the temporary occupation of a State's territory as a measure of coercion or reprisal. International Law permits of such procedure and Article 16 of the Covenant authorizes it as a measure of coercion when approved by the Council. According to the Monroe Doctrine such an occupation would not be permitted in regard to an American State. I draw particular attention to this point, because it has not been adequately emphasized in connection with Article 16.

"(4) Article 10 does not forbid the intervention of one State in the internal or international affairs of another State whenever international law permits of such intervention. The Monroe Doctrine does not admit of such action on the part of a European State towards any American State."[10]

It is therefore apparent that the scope of the Monroe Doctrine is broader, in so far as the western hemisphere is concerned; and it is more effective in its guarantees, since a great American state is prepared to take the initiative on its behalf. There is behind the policy material and moral power, immediately available on the American con-

[9] New York *Herald*, September 24th, 1923. [10] See Chap. I; pp. 4 and 32.

tinent, without the delay of conferences, and without a referendum to other states.

That the League of Nations is desirous of extending the European political system, of which it is the agent, to South American States, is unquestioned. It has considered the establishment of a bureau in South American countries but has, instead, established a South American bureau at Geneva. In addition, two South American countries have sent diplomatic representatives to the League [11] and their example, it appears, is to be followed by other states. As has been seen in the dispute between Bolivia and Chile the Assembly was willing to intervene had Chile agreed. In the Panama-Costa Rica controversy the Council acted contrary to its practice and intervened without awaiting a formal complaint by any one of its members. It may be pointed out that in the event of a dispute between two South American members of the League in which they resort to war in violation of the Covenant, Article 16 becomes *ipso facto* applicable and the members of the League are free to apply economic pressure or the Council is authorized to recommend the military forces necessary to protect the Covenant. Two questions arise: in the event that either policy was undertaken would the United States regard it as an infringement upon the Monroe Doctrine? Were the United States to become a member of the League and if a dispute came before the Council, involving the Monroe Doctrine, would it be in a position to better defend or apply that doctrine? In considering these questions, it may be recalled that under Article 21 of the Covenant the Senate was in doubt whether a member state or the Council should decide the fact whether a matter under discussion involved the Monroe Doctrine and was exempt. It may be said that the one vote of the United States in the Council will protect this Doctrine whenever a question arises. But it should be noted that the vote of a member which is a party to the dispute is not counted in unanimity, and the Council may make a report by a majority vote which has an effect upon public opinion, although not binding upon the parties.

PAN-AMERICAN CONFERENCES

The friendly relation established between the United States and the Latin American countries was the outgrowth of the development of the Monroe Doctrine. The first of a series of American conferences between the United States and twenty-one American republics was held in Washington in 1889. It arose from a suggestion made by Secretary of State Blaine that an equal number of representatives from each state

[11] Brazil and Guatemala.

meet "for the purpose of considering and discussing the methods of preventing war between the nations of America." At this conference, arbitration was declared to be the public law of the American continent; and the Union of American Republics was created with a Pan-American bureau as its agent. The second conference was held October 22nd, 1901-June 22nd, 1902, in Mexico City. This conference expressed a desire to adhere to the Convention for the Pacific Settlement of International Disputes adopted by the Hague Peace Conference in 1899. The signatories to the Hague Convention having agreed, the way was open for the participation of South American Republics in future conferences at The Hague.

The third conference met in July-August, 1906, in the city of Rio de Janeiro. A resolution was adopted, favoring the submission to the Second Hague Conference of the question of the forcible collection of public debts.[12] The Union of American Republics was enlarged and reorganized, and the international bureau was named the Pan-American Union with headquarters in Washington.

The fourth conference was held in July and August, 1910, at Buenos Aires, on the occasion of the centenary of the independence of Argentina. The fifth Pan-American conference should have been held in 1914 but was postponed until the end of the war. It was held in the city of Santiago in May, 1923. During the sixteen sessions, seventy-three resolutions were adopted and four conventions signed. The Conference authorized:[13]

"(1) The creation of four permanent committees to assist the Pan American Union in the study of the following subjects: Economic and commercial relations between the American States; international organization of labor in America; questions of hygiene in the countries of the continent; and the development of intellectual co-operation, with special reference to co-operation between American universities.

"(2) The redrafting of the article providing for the composition of the Governing Board of the Pan American Union, so as to authorize an American Republic which may not have a diplomatic representative accredited to the Government of the United States, to appoint a special representative on the Governing Board. It was also provided that the Chairman of the Governing Board, who has heretofore been *ex officio* the Secretary of State of the United States, should be elected by the Board.

The outstanding achievement of this movement, however, was the convention adopted at Santiago in 1923, for the settlement of disputes. It followed the general lines of the Hague Conferences for the ad-

[12] The Hague Conference of 1907 adopted a convention against the use of force under such circumstances.

[13] Statement by U. S. State Department, *Am. J. Int. Law,* July, 1923; p. 520.

vancement of peace, the distinctive characteristics being as follows:[14] The Pan-American Treaty provides that all controversies arising from any cause whatsoever between two or more High Contracting Parties and which it is impossible to settle through diplomatic channels, or to submit to arbitration through existing treaties, shall be submitted to a commission for investigation. The High Contracting Parties undertake not to begin mobilization or concentration of troops on the frontier of the other party nor to engage in any hostile acts or preparations for hostilities from the time steps are taken to convene the commission until it has rendered its report. This provision does not abrogate or limit the obligations contained in treaties of arbitration in force between the High Contracting Parties; and in instances where the parties have no general treaties of arbitration, the investigation shall not extend to questions affecting constitutional provisions nor to questions settled by other treaties.

The machinery provided consists: (1) of two commissions, one sitting at Washington; the other at Montevideo (Uruguay) to be composed of the three American diplomatic agents longest accredited to such capitals, and to be convoked at the call of their foreign offices for the purpose of receiving the request from the interested parties for the convocation of the Commission of Inquiry. (2) The Commission of Inquiry is to consist of five members, all nationals of American states, two of whom shall be appointed by each state, only one of whom shall be a national of the country, and the fifth shall be chosen by common accord from those already appointed and shall perform the duties of president. In the event that the elected member is not satisfactory, a substitute shall be appointed. (3) The Commission establishes its rules of procedure and renders its decision by a majority vote. (4) Each party bears its own expenses and a proportionate share of the general expenses. (5) The findings of the Commission do not have the value or force of a judicial decision or arbitral award. (6) When the report is in the possession of the governments, six months' time shall be allowed for renewed negotiations to bring about a settlement, and if during this time they are unable to agree, states shall recover entire liberty of action to proceed as their interests dictate. (7) The Treaty remains in force indefinitely, but any one of the parties to it may denounce it and release shall take effect one year after notification is given.

The Treaty was signed by the following states: Venezuela, Panama, United States of America, Uruguay, Chile, Guatemala, Nicaragua,

[14] Text of Treaty, published in *Advocate of Peace Through Justice;* April, 1924.

Brazil, Paraguay, Dominican Republic, Honduras, Argentine Republic, Ecuador, Colombia, Cuba and Haiti. (Among the important states which have not signed are Peru, Bolivia and Costa Rica. The American states not represented in the Fifth Conference may, however, by Article X, adhere to the Treaty at a later date). The United States Senate ratified this Treaty on March 18th, 1924. It will be observed that this Treaty approximates to a definition of aggression, a subject which has baffled European peace-makers. While it does not abrogate any existing conventions of a similar nature, there can be little doubt that it provides the machinery for settling American disputes within the western hemisphere.[15]

The Third Pan-American Conference, held in Rio de Janeiro in 1906, adopted a convention creating an International Commission of Jurists which was instructed to draft a code of private international law and another for public international law. It met in 1912 and considered the following subjects: (1) Maritime war, and rights and duties of neutrals; (2) war on land, internal warfare and claims of aliens, resulting therefrom; (3) international law in peace time; (4) the pacific settlement of disputes and international tribunals; (5) status of aliens and domestic relations; and the conflict of penal laws. Two committees were appointed to draft conventions. A report was made but no action taken by reason of the fact that the Commission which was scheduled to meet again in 1914 was prevented from doing so by the war.

The Fifth Conference held at Santiago, in 1923, adopted a resolution reorganizing this Commission, for the purpose of continuing the program mapped out in 1906, and adding thereto a number of additional items for consideration. Among them was the subject of the creation of an American Permanent Court of Justice. The result of its deliberations will be presented to the Sixth Conference which is to meet at Havana within five years.

The cardinal principles therefore in the Pan-American peace policy, as applied in the western hemisphere, are as follows:[16] (1) The Ameri-

[15] For resolutions of the Fifth Pan-American Conference concerning disarmament, as well as for Convention on Limitation of Armaments between five Central American states, see Chap. XXXVI; p. 683.

[16] Since the war, the following activities of the United States may be noted as being in accord with the foregoing policy: (1) Settlement of differences with Colombia and securing from it recognition of the Republic of Panama; (2) a formal separate peace with Germany, Austria and Hungary; (3) the settlement of the Tacna-Arica dispute; (4) intervention in the Panama-Costa Rica dispute; (5) Conference in Washington in December, 1922, to negotiate a treaty to put

can continent is not to be subject to future colonization by European powers. (2) The political system of Europe is not to be extended to the American continent. (3) Interposition by European powers to control the destiny of any American nation or oppress its people is to be regarded as an unfriendly act. (4) No intervention in the wars of European powers relating to themselves. (5) No entanglement of the United States in the broils of Europe, nor to suffer Europe to intermeddle in cis-Atlantic affairs. (6) The adoption of arbitration as the policy of the American continent. (7) The execution of a Pan-American treaty of arbitration among American States. (8) The creation of a commission of jurists to prepare a code of international law; and the study and preparation of a scheme for the establishment of an American Permanent Court of Justice.

THE HAGUE CONFERENCES BEFORE THE WAR

The United States, committed on the American continents to a policy of arbitration for the settlement of disputes, participated in The Hague Conferences of 1899 and 1907 for the purpose of extending that principle. The purpose of these conferences was (1) to discover methods of perpetuating peace through the substitution of law for force; (2) the drafting of conventions to regulate or prevent warfare; (3) the study of the principles of international law by a scientific non-political deliberative body, attached to no political organization; and (4) recommendations to its members of plans to maintain peace. Among the achievements of these conferences was the Convention for the Pacific Settlement of International Disputes which the United States delegation signed on July 25th, 1899, with the following reservation:[17]

"Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions or policy or internal administration of any foreign state; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions.

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into effect the provisions of the treaties of 1907 relating to better co-operation among Central American states and resulting in a Convention for the Limitation of Armaments between five of these states; (6) treaty with Cuba to determine the title to the Isle of Pines; and (7) participation in the Fifth Pan-American Conference and ratification of the Pan-American Treaty. (See also article by Hon. Henry Cabot Lodge in *American Foreign Affairs,* June, 1924.)

[17] *The Hague Court Reports,* by James Brown Scott; p. civ; see also Chap. XXVI; p. 512.

On October 16th, 1907, the delegation from the United States renewed this reservation, but the act of ratification contained this additional declaration: [18]

"That the United States approves this Convention with the understanding that recourse to the Permanent Court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in Article 53 of said Convention, to exclude the formulation of the *compromis* by the Permanent Court, and hereby excludes from the competence of the Permanent Court the power to frame the *compromis* required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the *compromis* required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise."

It is therefore apparent that, with respect to the Hague Conferences before the war, the United States had not the intention of relinquishing its traditional policy.

THE WASHINGTON CONFERENCE

In 1922, the United States continued its pacific policy adopted at the Hague Conferences by calling a Conference on the Limitation of Armaments, and on Pacific and Far Eastern questions. On July 8th, 1921, by direction of the President, the Department of State addressed an informal inquiry to the Principal Allied and Associated Powers (Great Britain, France, Italy and Japan) to ascertain if it would be agreeable for them to participate in a conference on the subject of the limitation of armaments, to be held in Washington.[19] In this inquiry it was suggested that the limitation of armament had a close relation to Pacific and Far Eastern problems and that "the consideration of all matters bearing upon their solution, with a view to reaching a common understanding, with respect to principles and policies in the "Far East," should be included. In accordance with this suggestion which was favorably received, an invitation was also extended to Belgium, China, the Netherlands and Portugal to participate in the Pacific and Far Eastern questions in connection with the Conference.

[18] *The Hague Court Reports,* by James Brown Scott; p. cvii.

[19] This proceeding was in accord with the policy of the Senate which had passed Senator Borah's resolution requesting the President to enter into such negotiations.

The following treaties were approved by the Conference and signed at its closing session on February 6th, 1922:[20]

"(1) A treaty between the United States of America, the British Empire, France, Italy, and Japan, limiting naval armament.

"(2) A treaty between the same Powers, in relation to the use of submarines and noxious gases in warfare.

"(3) A treaty between all Nine Powers relating to principles and policies to be followed in matters concerning China.

"(4) A treaty between the Nine Powers relating to Chinese customs tariff.

"The following treaties were notified to the Conference:

"(1) A treaty between the United States of America, the British Empire, France, and Japan, signed December 13, 1921, relating to their insular possessions and insular dominions in the Pacific Ocean.

"(2) A treaty between the same Powers, supplementary to the above, signed February 6, 1922.

"(3) A treaty between China and Japan, signed February 4, 1922, providing for the restoration to China of rights and interests in the Province of Shantung.

"In addition, while the Conference was in session, the Government of the United States and the Government of Japan reached an agreement in relation to the Island of Yap and the mandated islands in the Pacific Ocean, north of the Equator, which is to be embodied in a formal Convention."

In addition, the Conference reached a number of conclusions, including provisions for the appointment of a commission of jurists to consider amendment of the laws of war; for the establishment of a Board of Reference for Far Eastern Questions; for a commission to inquire into extra-territoriality in China; and matters relating to postal agencies, armed forces and railways in China;—also information concerning the committments with China of the states represented at the Conference and of China's committments to other states.[21]

This record of achievement, wherein there was accomplished a limitation of naval armament, with respect to capital ships; the adoption of rules for the control of submarines and for the use of poison gas; and the settlement of a number of Far Eastern questions, refutes the allegation that there has been any break in American international policy begun at The Hague before the war.

THE HAGUE ORGANIZATION SINCE THE WAR

The United States, having carried its belief in arbitration beyond the western hemisphere, after safeguarding its policy under the Monroe

[20] Report of American Delegation, February 9th, 1922, *Am. J. Int. Law*, April, 1922; p. 165, containing a full account of the proceedings. See also Chap. XXXVI.

[21] The texts of these treaties and documents are contained in the *Am. J. of Int. Law*, April, 1922; pp. 41-98.

Doctrine, now finds itself in a quandary. This is due primarily to the fact that the League of Nations, of which the United States is not a member, has constructed a Court of Justice in competition with the Court of Arbitration of which the United States Government is a member.

As has been seen, the League has refused to recognize the Hague Organization except as an assisting body in the election of judges to the League Court. This refusal extended to the proposal that the Hague Organization undertake the codification of international law. The League Court, however, is open only to states signatory to the Treaty and to other states upon conditions prescribed by the Council. The United States and four other important states are members of the Hague Organization but they have not become members of the League System. The United States is not, therefore, in a position to further the principles of arbitration through the Court of Justice of which it is not a member, owing to the relationship existing between the Court and the League.

The contest between the League System and the Hague Organization has not yet assumed an active phase. Thus far, the policy of isolation and exclusion pursued by the League toward that Organization has been unopposed. Such co-operation as the United States has undertaken toward the settlement of international controversies as, for instance, in the matter of reparations, has been through independent channels. Whenever it has acted in the interests of international peace, as in the Washington Conference to Limit Armaments, it has pursued a similar course. In the settlement of the Norwegian Ship Case, the one instance of an important arbitration in which the United States has been engaged since the war, resort was had to an arbitral tribunal. Although inactive, the Hague Organization remains unimpaired. It has a Court of Arbitration, equipped to settle disputes; facilities for the study of international law; and competence for drafting international conventions in which all of the leading nations of the world may participate. It is unhampered by bitter controversies between victors and vanquished. In addition, it is adequately financed.

In the event that no change takes place in the foreign policy of the United States with regard to the League of Nations System, the question of the resumption of the Hague Conferences as a medium of expression for the policies of states acting independently of the League, whether members or not of that body, will become a matter of consequence. Already there is discernible in American opinion a trend of thought toward a return to the Hague Organization and to a Third

Hague Conference as a means of continuing the program for the pacificatory settlement of disputes and for the formulation of international law. As the League increasingly undertakes duties under the Peace Treaties, involving the preservation of the property and other rights of the Allied Powers, the conviction becomes clearer that such executive and local duties unfit the Council for that dispassionate deliberation which has characterized the Hague Peace Conferences, and that states having little voice or personal interest in these Treaties will gradually find their way to a juridical body in which they will have a real voice for the development of a program to abolish war, codify international law, and perfect measures of peace.

Official American notice was taken of this trend of opinion when Senator Pepper introduced in the Senate on April 7th, 1924, the following resolution, which furnishes an illustration in point: [22]

"Whereas the International Peace Conferences held at The Hague in 1899 and 1907 were found to present useful opportunities for the friendly exchange of views and opinions upon great world questions; and

"Whereas the progress subsequently made at the Washington Conference of 1922 in the direction of limiting armaments may well be conserved and extended in the near future if the attention of all nations be simultaneously focused upon a matter so vital to civilization; and

"Whereas all proposals for the limitation of armaments necessarily presuppose the existence of a body of international law adequate to the present and future needs of the nations and of courts of arbitration and of courts of justice to interpret and to apply its recognised and accepted principles: Now, therefore, be it

"Resolved, 1. The Senate advises the President of the United States that, in the judgment of the Senate, the time has come when a world conference similar to the conferences heretofore held at The Hague may with advantage be assembled for the consideration of questions affecting the peace of the world.

"2. That the Senate further advises the President that, in the judgment of the Senate, the agenda at such a conference should include the following:

"(a) A consideration of the further reduction of naval armaments and of the limitation of land and aerial armaments;

"(b) A consideration of the ways in which international law may be made at once more certain and more responsive to present and future needs; and

"(c) A consideration of plans for a world court either through a further development of the present Permanent Court of Arbitration at

[22] *Congressional Record,* 68th Congress, First Session, April 7, 1924. (M. Herriot, under date of August 26th, 1924, is quoted as being opposed to piece-meal plans for disarmament; "that is to say a reduction of land forces to be followed by a reduction of aerial and other forces," and that the French Government will not take part in a conference unless a system of safety guarantees has been established.)

The Hague or through the disassociation of the present Permanent Court of International Justice at The Hague from the League of Nations."

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The question whether the United States will resume its international arbitral policy through the Court of Justice without the disassociation of that tribunal from the League of Nations, and whether, as constructed, that tribunal is in accord with the keeping of American traditional policy, remains unanswered. This indecision has not, however, been due to the absence of effort but to the division of opinion, hereinbefore noted. This division is nowhere better illustrated than by the efforts being put forth to induce the United States to join the Court of Justice. Four proposals have been submitted to the United States Senate, in the order named:

THE HARDING-HUGHES PROPOSAL

In a letter to President Harding, dated February 17th, 1923, Secretary of State Hughes made the following recommendation:[23]

"Accordingly I beg leave to recommend that, if this course meets with your approval, you request the Senate to take suitable action advising and consenting to the adhesion on the part of the United States to the protocol of December 16th, 1920, accepting the adjoined statute of the Permanent Court of International Justice, but not the optional clause for compulsory jurisdiction; provided, however, that such adhesion shall be upon the following conditions and understandings to be made a part of the instrument of adhesion:

"I. That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the Covenant of the League of Nations constituting Part I of the Treaty of Versailles.

"II. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States members, respectively, of the Council and Assembly of the League of Nations in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court or International Justice, or for the filling of vacancies.

"III. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.

"IV. That the statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States." [24]

[23] *Senate Document No. 309*, 67th Congress, Fourth Session.
[24] Transmitted to the Senate on March 2nd, 1923.

It will be observed that these proposals are general in that they establish only the principles of the reservations. These are to be made part of the instrument of adhesion but they leave vague the following points: (1) as to who is to be the judge of whether such adhesion involves a legal relation or what constitutes an obligation under the Covenant and whether questions arising therewith are matters for the Senate to consider; (2) as to the manner of appointing representatives, their instructions, and to whom they shall be responsible; (3) as to the manner in which the Court Statute may be amended and whether the consent of the United States requires the approval of the Senate. The Senate has not been disposed to accept the resolution introduced by Senator Swanson (No. 220) embodying these recommendations in substantially the form recommended by the Secretary of State. In the minority view of the members of the Foreign Relations Committee, which was in favor of this proposal, it is stated:[25]

"Under the present statute creating the Permanent Court of International Justice the United States by its terms, being mentioned in the annex to the Covenant of the League is a competent suitor in the court. Thus, if the United States desires she can easily utilize the court for any purpose she may desire upon the payment of reasonable costs fixed by the court.[26]

President Harding was not wholly satisfied that these proposals would advance the cause of pacific settlement of disputes in harmony with American traditions. This was apparent from his address delivered on June 21st, 1923, in St. Louis, when he said:

"Granting the noteworthy excellence, of which I, for one, am fully convinced, of the Court as now constituted, why not proceed in the belief that it may be made self-perpetuating? This could be done in one of two ways: (1) by empowering the Court itself to fill any vacancy arising from the death of a member or retirement for whatever cause without interposition from any other body; or (2) by continuing the existing authority of the Permanent Court of Arbitration to nominate and by transferring the power to elect from the Council and Assembly of the League to the remaining members of the Court of Justice.

"The fixing of compensation of the judges, supervision of expenditures, the apportionment of contributions, etc., could also be transferred from the League to either the Court of Arbitration or a commission designated by the member nations. Thus, incidentally, would be averted the admitted unfairness of the present system, which imposes a tax upon the members of the League who are not subscribers to the Court.

"The exclusive privilege now held by the League to seek advisory legal guidance from the Court might either be abolished, or, more wisely, perhaps,

[25] *Senate Report No. 634,* Part II; 68th Congress, First Session.
[26] *Ibid.*

be extended to any member or group of member nations. Thus all would be served alike, subject as now to determination by the Court itself of the kind of questions upon which it would render judgments."

In effect, this statement proposed the separation of the League from the Court. Senator Swanson took cognizance of one aspect of this statement, in the minority report referred to, wherein he noted that the resolution, containing the Harding-Hughes proposal, was amended on suggestion of Senator Walsh, as follows:[27]

"The United States shall be in no manner bound by an advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the statute for the said court adjoined to the protocol of signature of the same to which the United States shall become signatory."

In his public addresses, President Coolidge has supported the Harding-Hughes proposal, as follows:[28]

"Our foreign policy has always been guided by two principles. The one is the avoidance of permanent political alliances which would sacrifice our proper independence. The other is the peaceful settlement of controversies between nations. By example and by treaty we have advocated arbitration. For nearly twenty-five years we have been a member of The Hague Tribunal, and have long sought the creation of a permanent World Court of Justice. I am in full accord with both of these policies. I favor the establishment of such a court intended to include the whole world. That is, and has long been, an American policy.

"Pending before the Senate is a proposal that this Government give its support to the Permanent Court of International Justice which is a new and somewhat different plan. This is not a partisan question. It should not assume an artificial importance. The Court is merely a convenient instrument of adjustment to which we could go, but to which we could not be brought. It should be discussed with entire candor, not by a political but by a judicial method, without pressure, and without prejudice. Partisanship has no place in our foreign relations.

"As I wish to see a court established, and as the proposal presents the only practical plan on which many nations have ever agreed, though it may not meet every desire, I therefore commend it to the favorable consideration

[27] *Senate Report, No. 634,* Part II, 8th Congress, First Session.

[28] The Republican National Platform for 1924 contains the following plank:

"The Republican Party reaffirms its stand for agreement among the nations to prevent war and preserve peace. As an important step in this direction we indorse the Permanent Court of International Justice and favor the adherence of the United States to this tribunal as recommended by President Coolidge. This Government has definitely refused membership in the League of Nations and to assume any obligations under the Covenant of the League. On this we stand."

of the Senate, with the proposed reservations clearly indicating our refusal to adhere to the League of Nations." [29]

"As a result of American initiative there is already in existence The Hague Tribunal, which is equipped to function wherever arbitration seems desirable, and based in part on that, and in part on the League, there is the International Court of Justice, which is already functioning. A proposal was sent to the last Senate by President Harding for our adherence to the covenant establishing this court, which I submitted to the favorable consideration of the present Senate in my annual message. Other plans for a World Court have been broached, but up to the present time this has seemed to me the most practical one. But these proposals for arbitration and courts are not put forward by those who are well informed with the idea that they could be relied upon as an adequate means for entirely preventing war. They are rather a method of securing adjustment of claims and differences, and for the enforcement of treaties, when the usual channels of diplomatic negotiation fail to resolve the difficulty." [30]

"More than a year ago President Harding proposed that the Senate should authorize our adherence to the Protocol of the Permanent Court of International Justice, with certain conditions. His suggestion has already had my approval.

"On that I stand.

"I should not oppose other reservations, but any material changes which would not probably receive the consent of the many other nations would be impracticable. We cannot take a step in advance of this kind without assuming certain obligations. Here again if we receive anything we must surrender something." [31]

THE LENROOT RESOLUTION

The first of a series of resolutions, intended to separate the Court from the League, as a condition of the adherence of the United States to the Protocol, was introduced by Senator Lenroot on December 10th, 1923. It proposed that amendments be made in either the Court Statute or Covenant, in the following respects: (1) Election of judges by the diplomatic representatives accredited to The Hague; (2) expenses of the Court to be paid directly by the signatory states; (3) the Court to be open to all states alike; (4) the optional clause to be open to all states; and (5) the Court Statute not to be amended without the consent of the United States. This resolution was referred to the Committee on Foreign Relations and no action was taken thereon.[32]

[29] Address before Congress, December 6, 1923.

[30] Speech to the members of the Associated Press, April 22, 1924.

[31] Speech at the Arlington National Cemetery, May 30, 1924.

[32] *Senate Res. No. 29,* 68th Congress, First Session. Senator Lenroot's illness and consequent absence from the Senate prevented his urging the adoption of this measure.

THE LODGE RESOLUTION

While the Harding-Hughes proposal and Lenroot resolution were before the Committee on Foreign Relations, a campaign was inaugurated in the United States in favor of the Harding-Hughes proposal, culminating in hearings held by a sub-committee appointed by the Committee on Foreign Relations, on April 30th-May 1st, 1924.[33] At these hearings, more than fifty persons appeared in favor of the Court. None appeared in opposition.[34]

On May 9th, Senator Lodge, chairman of the Committee on Foreign Relations, introduced a resolution in the Senate providing for the establishment of a world court.[35] This resolution contained sixty-seven articles and was accompanied by an explanation prepared by the Hon. Chandler P. Anderson, ex-counsel to the State Department. In brief, the bill proposed the following deviations from the Court Statute: (1) A world court to be composed of independent judges to be elected without regard to nationality; (2) to be chosen by an electoral commission consisting of a general committee, and a special committee composed of representatives from the United States, Great Britain, France, Italy and Japan, each with one representative; (3) the Electoral Commission to meet at The Hague; and (4) twelve judges and four deputy judges to be nominated by the national groups in the Court of Arbitration.[36] If a judge considers that for any special reason he should not take part in a decision he notifies the President; if the President of the Court is of the opinion that a judge should not sit, he shall give him notice; and in case of disagreement the Court will decide.[37]

The other significant differentiations from the present Court Statute were, however, contained in additional articles, numbered LXII to LXVII as follows:

"Article LXII. The word 'States' as used in this Statute, means only a fully self-governing State, but does not include any Dominion, Colony, or other component part of a State.

"Article LXIII. The words 'signatory powers,' mean the States which sign or adhere to the protocol attached to this Statute.

[33] The sub-committee consisted of Senators George Wharton Pepper, chairman; Frank B. Brandegee, Claude A. Swanson, Key Pittman and Henrik Shipstead

[34] The opposition, believing there was no likelihood of a measure being passed, agreed not to waste the effort or time of the Senate Committee by presenting their views.

[35] *Senate Res. No. 122;* 68th Congress, First Session.

[36] The mode of election did not differ materially from that prescribed in the present Court Statute. (Annex II.)

[37] This provision is less specific than Article 17 of the Court Statute. (Annex II.)

"Article LXIV. A signatory power may withdraw from the Court and terminate its obligations under this statute after giving two years' notice of its intention to do so to the Secretary of the Electoral Commission or to the other signatory powers.

"Article LXV. The Court shall not have jurisdiction to render advisory opinions on any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States of the United States or concerning the question of the alleged indebtedness or money obligations of any State or the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely Government policy or any question which is considered by the Government of the United States to be a domestic question.

"Article LXVI. The Court shall be bound by the principle that international law recognizes the authority of the laws of the United States within its own jurisdiction as applied to foreigners or to foreign owned property therein, whether in time of peace or war.

"Article LXVII. Before a case in which the United States is concerned can be submitted to the Court a special agreement must be concluded between the United States and the other parties in interest, defining clearly the matter in dispute, the scope of the powers of the Court, and the periods for the several stages of procedure, and such special agreements on the part of the United States can only be made by the President of the United States by and with the advice and consent of the Senate thereof."

In the report submitted by Mr. Anderson the conclusion was as follows:[38]

"In view of the foregoing considerations, it is recommended that in accordance with the plan above proposed:

"1. The United States should resume its former position of leadership in the development of international law and the organization of the world for peace on the basis of respect for law and the jural equality of all nations.

"2. To this end the United States should take appropriate steps for convening the third Hague Peace Conference.

[38] On the question of an association of nations, the report stated:

"The advantage of an association of nations in addition to The Hague organization as an influence for maintaining peace has not been overlooked, but such an association is not suggested in this plan because it seems impracticable at present to organize such an association independently of the League of Nations.

"The League covers the ground for the Old World, and many of the nations of the New World are members of it, and so long as the members are satisfied with that organization it would be unseemly for the United States to attempt to disorganize it by proposing a different association either for the Old or the New World.

"If the members of the League should desire the co-operation of the United States, an association of nations should be proposed for the purpose of holding international conferences at regular intervals to facilitate international co-operation, and special conferences for special purposes, or in time of emergency when the peace of the world is threatened, and also for the purpose of

"(a) To reaffirm and further develop the world organization for peace embodied in the Hague Convention of 1907 for the pacific settlement of international disputes; and

"(b) To make more effective all the modes of procedure, therein provided for the amicable adjustment of international disputes; and

"(c) To transform the present League Court into a World Court of Justice as a part of The Hague organization; and

"(d) To formulate and agree upon further rules and principles of international law which should be embodied in the code of the law of nations; and especially

"(e) To define (1) justiciable questions which all nations should agree are subject to arbitration, and (2) unjustifiable wars and the legal restraints which should be imposed upon the sovereign right of a nation to declare war, the violation of which all nations should agree would constitute an international crime.

"(3) Pending the meeting of another Hague Conference, the United States should enter into preliminary agreements with other great powers defining justiciable questions and unjustifiable wars and stigmatizing such wars as international crimes, and imposing the legal restraints above suggested upon the legality of war."

This Resolution was referred to the Committee on Foreign Relations and from that body was reported a composite measure in the form of a resolution.

THE PEPPER RESOLUTION

Senator Pepper introduced a Resolution (No. 234) which the majority of the Foreign Relations Committee reported favorably to the Senate, under date of May 26th, 1924, together with a report prepared by Senator Pepper.[39] This Resolution contains the last word of the Committee upon the question and the Senate, not having passed the Resolution, here the matter rests.[40]

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maintaining a central administrative bureau in charge of the administration of those international activities which may properly be placed under the charge of an international bureau.

"In the present situation, the existing Hague organization, if continued and developed in accordance with its original design, supplemented by occasional outside conferences such as the Washington Limitation of Armaments Conference, will adequately fulfill these purposes, as far as the United States is concerned."

[39] Text of Resolution. (Annex III.)

[40] The 1924 platform of Senator La Follette contains no reference to the Court or League; the platform of the Democratic National Committee renews its confidence in the Court and adopted a referendum on the League of Nations, reading as follows:

"Shall the United States become a member of the League of Nations upon such reservations or amendments to the Covenant of the League as the President and Senate of the United States may agree upon? Immediately upon an affirmative vote we will carry out such mandate."

The Resolution stated that its object was to "express with greater precision the safeguards suggested in general terms in the message of President Harding, "in the following particulars: (1) Adherence to the Court; (2) upon condition that the Court Statute be amended so as to permit the United States to participate in the election of judges; (3) that the President should communicate with states which have adhered for the purpose of securing their assent to such amendments; (4) that the Senate will consent to adherence when the amendments specified in the annexes to the Resolution have been made; (5) that the adherence is subject to the disclaimer by the United States of all responsibility for the exercise by the court of jurisdiction to render advisory opinions; and subject to the declaration that the United States intends to adhere to the Monroe Doctrine as its national policy; (6) that the signature of the United States shall not extend to the optional clause; and (7):

"That the Senate advises the President that a Third International Conference similar to The Hague Conferences of 1899 and 1907 be called not later than the year 1926 for purposes which shall include the giving of effect to the recommendation of the Committee of Jurists upon the basis of whose report the Court was established, regarding the clarification and further development of international law, and the codification thereof."

The first Annex to this Resolution provided for amendments to the Protocol of Signature, opening the Court to all states, and authorizing the deposit of ratifications with the Secretary-General of the Permanent Court of Arbitration at The Hague.[41] The second Annex provided for a new method of electing judges through representatives of the signatories, and the omission in the Court Statute of all references by name to the League of Nations or the Council. The Resolution provided for a complete separation of the Court and the League, except that the authorization to the Court to render advisory opinions contained in Article 14 of the Covenant is dealt with by implication, namely, in Article 1 of the Court Statute the clause stating that the Court is established in accordance with Article 14 of the Covenant was stricken out and it may be held that, in the absence of such provision,

[41] The distinction between a reservation and an amendment, as here emphasized, lies in that a reservation is made at the time of adhering to an existing instrument or institution, to be applied only in the event that the circumstances contemplated arise subsequently. It reserves to the state liberty of action in a matter which becomes a question of fact and of interpretation. An amendment on the contrary requires that some act shall be performed by others as a condition precedent and in a manner satisfactory to the state before its adherence takes effect. Senator Pepper's Resolution proposes that such acts shall be performed with reference to the Court Statute; while the Harding-Hughes proposal would rely upon the former method.

the Court would not be found by Article 14 and therefore would be without authority to render such opinions when requested.

The Committee on Foreign Relations, in reporting this Resolution, submitted a report dealing with (a) world court and world law; (b) brief history of the Court; (c) the plan and the protocol; (d) the relation of the Court and the League; (e) amendment not reservation; (f) the Swanson resolution; (g) the Committee resolution; (h) the vote of the British Empire; (i) the Monroe Doctrine; and (j) the way of peace. The minority of the Committee submitted a report in defense of the Hughes-Harding proposal and in criticism of the Pepper Resolution.[42]

PRESENT STATUS OF COURT PROPOSALS

With regard to this series of resolutions, having for its object the separation of the Court from the League, it may be observed that however much they may tend to dispose of a troublesome political question in the United States, from the point of view of the prevention of war, they add little to security. The jurisdiction of the Court of Justice is not enlarged in any manner; there will be no immediate change in its personnel, due to the adhesion of the United States; and there is no reason to believe that states will be induced thereby to submit disputes to the Court. If, however, advisory opinions in actual disputes were to be abolished, it would be a distinct gain in the juridical over the arbitral features of the work of the Court.

From the European point of view, it may be questioned, however, whether these proposals for separation are advisable. It is somewhat generally believed that members of the League will accept American suggestions in order to facilitate the adherence of the United States. This ready assumption indicates an incomplete understanding of the intention of the Peace Conference in proposing this Court; of the purpose of the Council in creating it; and of the place the Court occupies in the League of Nations System which has been created by the Allied Powers. From the European viewpoint, the importance of American entrance into the Court is conditioned by the fact of whether it is in reality a step nearer the League and American acceptance of the Treaty. To separate the Court from the League and from the Peace Treaties could hardly be regarded as such a step.

The separation of the Court from the League possesses few advantages from the point of interest of the Allied Powers for they have created it as part of a system which they are reluctant to see disrupted,

[42] Annex IV for text of the Report.

as every such undertaking imperils their security under the Treaties. The Court as a local European institution has an important role. It is apparent that increasingly the Covenant and Peace Treaties will require legal interpretation and that states are not wholly satisfied with the political interpretations now being given by the Council and Conference of Ambassadors. The Court has not yet come into full possession of the functions for which it was created; in that (1) much of the work being done by committees of jurists is the legitimate work of the Court and may eventually be so regarded by the Allied Powers; (2) the mixed commissions and other quasi-judicial tribunals which encumber central Europe cannot always remain and the gradual reference of their duties to a duly constituted Court, will increase the assurances of peace; (3) the Council, as a Court of Appeal on legal questions from the Saar, and Danzig, is clearly in competition with its Court, which competition may be lessened as the Allied Powers agree to recognize the Court; and (4) the system of administration set up by the Allied Powers under the Peace Treaties requires a judicial tribunal and the Court of Justice is intended to constitute the Supreme Court of that system of control.

Also, the argument that the United States may join the Court without undertaking to submit any dispute or incur any obligation is not likely to add to its moral leadership in Europe. Such an attitude is in entire accord with the practice of the present signatories to the Court, which has been so effective in isolating it from vital issues. To undertake to separate a Court from its political organization for the purpose of gaining the adherence of a country on the theory that such a country will assume no obligation is a project of doubtful value to the promotion of European peace.

At the time of writing in the midst of a Presidential election in the United States, the extension of American foreign policy in the direction of the League of Nations System seems to be in the following condition: The President and Republican candidate is opposed to the United States joining the League; and in support of the Harding-Hughes plan in favor of the Court; and his platform supports his position. The Democratic candidate is on record in favor of joining both the League and the Court, and his platform expresses confidence in the Court but presents him with a referendum on the League issue. Senator La Follette ignores both the League and the Court as being unimportant issues and his platform supports his views. The Republican majority of the Senate Committee on Foreign Relations is opposed to the League and to the Harding-Hughes proposal to join the Court, while the Democratic minority is in favor of both.

CHAPTER XXXVI

ARMAMENT AND DISARMAMENT

There remains the question of the future. What are the plans which European states have under consideration to stop war and what are their policies for security? Do they trend in the direction of territorial security, and the preservation of the sovereignty and equality of states? In the examination of these plans, that of disarmament occupies first rank.

DISARMAMENT CONFERENCES

The Hague Conferences of 1899 and 1907 drew up regulations for the methods of warfare and also discussed plans for the limitation of armaments, on the basis of an agreement to limit expenditure. Since these plans came to nothing and the regulations drawn up were disregarded in the Great War, the Great Powers had before them the task of taking up the question anew.

Part of the work was entrusted to the League of Nations by Articles 8 and 9 of the Covenant,[1] but part of it was undertaken in independent conferences. These conferences are more indicative of the policies of states than the work of the League, since they took place under auspices of the Foreign Offices of the respective countries while most of the disarmament work of the League has been planned by a body not representative of any government.[2] A summary of the conferences follows:

The first conference for the limitation of armaments after the Great War met at Washington, from November 11th, 1921, to February 6th, 1922.[3] Five states were represented, namely, the United States, Great Britain, France, Italy and Japan. The intention was to limit land as well as naval armaments and to draw up "rules for control of new agencies of warfare."[4] In the matter of land armament no agreement could be reached, but a Treaty for the limitation of Naval Armament was finally drawn up and signed on February 6th, 1922. According to Part I of this Treaty, the United States was permitted to retain 18 capital ships of 500,650 tons; Great Britain 22, of 580,450 tons; France 10 with a tonnage of 221,170; Italy, 10 of 182,800 tons and Japan 10 of 301,320 tons. All other capital ships, whether built or under con-

[1] For work of League on disarmament see *Official Journal,* Special Supplement No. 16, 1923.

[2] See p. 695 for establishment of Temporary Mixed Commission.

[3] Chap. XXXV; p. 669 for results of conference.

[4] For more detailed account, see *Am. J. Int. Law,* April, 1922.

struction, were to be scrapped, and Part II of the Treaty provided for the manner of scrapping and the time within which it was to take place. No new ships were to be completed by the United States, Great Britain and Japan before the year 1934, and by France and Italy, respectively, before 1930 and 1931. The maximum limit to which these states may build ships was laid down as 525,000 tons each for the United States and Great Britain, 175,000 tons each for France and Italy and 315,000 tons for Japan. Regulations were drawn up for the use of submarines and poison gas. The Pan-American Conference held at Santiago in May, 1923, confirmed the provisions of the Washington Naval Treaty and recommended that other governments adhere to it. The Washington Conference accordingly succeeded in limiting the naval armaments of five Great Powers, although the burden of land and air armaments was not eased.

But it appears that the example for general disarmament treaties—land, naval and air—also has been set on the American continent. Five Central American Republics, Guatemala, Honduras, Salvador, Nicaragua and Costa Rica, in a treaty signed at Washington on February 7th, 1923, bound themselves for five years to keep under arms only a certain agreed number of men; not to export arms or munitions; not to acquire new aircraft or vessels of war; not to use poison gases in time of war; and to submit to each other every six months complete reports on the measures adopted in execution of the Convention.[5] This Convention appears to be the first one of its kind and differs widely in its scope from the regional agreements encouraged by the League of Nations for the purpose of facilitating the reduction of armaments.[6]

In Europe, the only apparent effort to limit armaments was a Conference held at Moscow in December, 1922, at which Esthonia, Finland, Latvia, Lithuania, Poland and Russia were represented.[7] No definite agreement was reached, however, and three of the states concerned, Latvia, Lithuania and Esthonia, have sought security in an alliance with each other,[8] while the others rely upon armaments.

DISARMAMENT BY THE LEAGUE

Such being the record of disarmament attained outside of the League, what has been accomplished toward this end by the League?

[5] For text of Treaty, see Annex V.

[6] See text of French-Czechoslovak Treaty; p. 711. [7] See p. 714.

[8] The St. Germain Convention of 1919 has been considered as an effort to limit armaments, but the United States Government, in its refusal to ratify that Convention pointed out that it was primarily a system of control rather than a scheme for the actual limitation of armament. (See p. 697.)

Article 9 of the Covenant provides for a Permanent Commission to advise the Council on military, naval and air questions and on the execution of Articles 1 and 8 of the Covenant. On May 19th, 1920, M. Bourgeois presented a report to the Council on the subject of the Constitution of the Permanent Advisory Commission on Disarmament.[9] He summarized the duties of this Commission as follows: (1) Under Article 1 of the Covenant, to prepare the military, naval and air regulations for states, requesting admission to the League. (2) Under Article 8, to investigate the military, naval and air status of members of the League and to formulate plans for the reduction of armaments and for the limitation of the manufacture of arms. (3) Under Article 16, to advise the Council on the military, naval and air forces to be used by member states against a defaulting state. (4) Under Article 23 of the Arms Traffic Convention of St. Germain, to assist the League in the supervision of traffic in arms. (5) Under Article 213 of the Treaty of Versailles, to assist the Council in investigating the manner in which Germany executes the military regulations of the Treaty.

The Council proposed that the Commission should consist of "national representatives, responsible to their respective governments and general staff," and adopted a series of resolutions,[10] of which Article 1 provided that it consist of one military, one naval and one air representative of each member of the Council; Article 2 permitted representatives of any other states, members of the League, to sit with the Commission temporarily if a question concerning those states was being discussed; Article 3 gave each national delegation one vote; Article 5 provided that the pay and allowances of the officers of the Commission were to be furnished by their respective governments; Article 6 divided the Commission into three sub-commissions (military, naval and air); Article 7 laid down that each sub-commission was to nominate a chairman for six months in alphabetical order, and that the Chairman of the Commission should be selected from among these three chairmen; Article 9 provided that the Commission may meet on demand of the Council or of its own members; and Article 12 arranged that the secretarial work of the Commission was to be carried out by three technical officers, nominated by the Secretary-General.

Having laid down these rules, the Council instructed the Commission to draft regulations on the military, naval and air forces of the states, then having applied for admission to the League, and to request

[9] *Official Journal*, June, 1920; p. 131. [10] *Ibid.*, pp. 134-136.

the governments, signatory to the Arms Traffic Convention of St. Germain of September 10th, 1919, to furnish information on their export of arms and to submit proposals for the formation of a Central International Office for the exchange of information, as provided in the Convention.[11]

The Commission held its first meeting at St. Sebastian in August, 1920. On October 22nd, the Commission presented its first detailed report to the Council. The subjects dealt with had been five, namely:[12]

"(1) Asphyxiating gases. (2) Composition of the Military, Naval and Air Forces of the States which have requested admittance to the League of Nations. (3) Traffic in Arms and Munitions. (4) Constitution and Composition of the Organization to be placed at the disposal of the Council of the League of Nations for the exercise of the right of investigation authorized by Article 213 of the Treaty of Peace of Versailles, Article 159 of the Treaty of Peace of St. Germain, Article 104 of the Treaty of Peace of Neuilly, Article 143 of the Treaty of Peace of Trianon.[13] (5) Preliminary Enquiries to serve as a Basis for Proposals for the Carrying out of the Clauses of Article 8 of the Covenant."

Upon these questions the Commission agreed as follows:[14]

"(1) The employment of gases is a fundamentally cruel weapon, though not more so than certain other weapons commonly employed, provided that they are only used against combatants. Their use against non-combatants as objective, must however, be regarded as barbarous and inexcusable.

"(2) It would be useless to seek to restrict the employment of gases in war time by prohibiting or limiting their manufacture in peace time.

"(3) The prohibition of laboratory experiments is impracticable. * * *

"The question as to whether the preparation of international regulations with regard to the use or prohibition of asphyxiating gases should be undertaken is * * a question into which the consideration of international law and humanity must enter.

"This question, consequently, is not within the competence of a purely technical Commission, which therefore considers that it is not in a position to supply an answer on this point."[15]

[11] This Convention was signed by the United States of America, Belgium, Bolivia, British Empire, China, Cuba, Czechoslovakia, Ecuador, France, Greece, Hedjaz, Italy, Japan, Nicaragua, Panama, Poland, Portugal, Roumania, Kingdom of the Serbs, Croats and Slovenes and Siam. *(Annex to the Supplementary Report* to the Fourth Assembly; p. 8.)

[12] *Official Journal,* November-December, 1920; p. 37.

[13] For duties of Council under these Articles see Chap. III; p. 64.

[14] *Official Journal,* Nov., Dec., 1920; p. 39.

[15] The work of this Commission was erroneously referred to in the Sixth Committee of the First Assembly, when M. Viviani (France) stated:

> "The Technical Commission which had been set up by the Council had already passed two resolutions (1) recommending that the use of poisonous gases should be prohibited, and (2) that the manufacture of poisonous gas, if any, should in any case be reduced to a minimum." *(Records of the First Assembly,* Committees, Vol. II; p. 249.)

The military, naval and air conditions of the states, requesting admission to the League, appeared to the Commission too unsettled to be regarded as anything but provisional. On the subject of traffic in arms and munitions, the Commission considered that a Central International Office as proposed by the Council would be of no use until the St. Germain Convention for the Control of Traffic in Arms came into force. The sub-commissions instructed their delegates to obtain information from their respective governments concerning the organization to be placed at the disposal of the League. The Commission finally decided:[16]

"To consider the practical methods which may be employed for rapidly obtaining, when the Council shall so decide, all information with regard to armaments, and also the principles on which future plans for the reduction of armaments may be based."

In December, 1920, the Commission submitted further an extensive questionnaire for information regarding armaments. This was not sent out as the Council did not consider the moment opportune.[17]

PRELIMINARY WORK

The Sixth Committee of the First Assembly was created to deal with disarmament. A report by M. Bourgeois on the work of the Permanent Advisory Commission was submitted together with the above report of the Commission itself. M. Lange (Norway) in a statement made to the Committee pointed out that not only technical questions were involved in disarmament but also the geographical situation of countries, their relation with neighboring states, and similar questions.[18] He therefore suggested that the Permanent Advisory Commission created by the Council be completed (1) by a section of the Secretariat to collect statistics and exchange information, and (2) by a commission "consisting of members, possessing the necessary political, historical, economical and social competence, half of whom should be nominated by the Council and the remainder by the Assembly."

In accordance with this proposition the sub-committee of the Sixth

[16] *Official Journal*, November-December, 1920; p. 45.

[17] On a recommendation of this Commission, passed in November, 1920, the Council requested the United States to name representatives to sit with the Commission during the study of the reduction of armaments, which request was declined. (*Official Journal*, November-December, 1920; p. 50.)

[18] *Records of the First Assembly*, Committees, Vol. II; p. 314.

Committee drew up a report to the Assembly which was adopted unanimously by the Committee. It contained three resolutions[19] referring to the work of the Permanent Advisory Commission and the questions submitted to the Assembly. Resolution 1 urged the signatory states of the St. Germain Arms Traffic Convention to ratify the Convention without delay and to establish the International Office of Control. Resolution 2 proposed that the Assembly request the Council to order an investigation of the private manufacture of war material; and Resolution 3 recommended in part as follows:[20]

"Realising on the other hand that a complete and comprehensive scheme of disarmament depends upon the following conditions: first, under the responsibility of the Powers signatory to the Treaties of Peace, upon the complete fulfilment of the reduction of armaments imposed by the above-mentioned Treaties upon certain of these Powers; secondly, upon the exercise, as occasion may demand, of the right of investigation accorded by these Treaties to the Council of the League of Nations, in order to maintain this reduction; and lastly, on the collaboration of the other great military Powers which have hitherto remained outside the League, invite the Council:

"(a) To request the Permanent Advisory Commission for Military, Naval and Air Questions rapidly to complete its technical examination into the present condition of armaments;

"(b) To instruct a temporary commission, composed of persons possessing the requisite competence in matters of a political, social and economic nature, to prepare for submission to the Council in the near future reports and proposals for the reduction of armaments as provided for by Article 8 of the Covenant; * * *

"(d) To consider the mechanism by means of which the military information to be exchanged under the provisions of Article 8 of the Covenant can be verified in the event of the principle of mutual verification by Members of the League being confirmed by an amendment to the Covenant.

"(e) Pending the full execution of the measures for the reduction of armaments recommended by Article 8 of the Covenant, the Committee invites the Assembly to request the Council to submit for the consideration of the Members of the League the acceptance of an undertaking not to exceed for the first two financial years following the next financial year, the sum total of expenditure on the military, naval and air services provided for in the latter budget, subject, however, to account being taken of the following reservations:

"(1) Any contributions of troops, war material and money recommended by the League of Nations, with a view to the fulfilment of obligations imposed by Article 16 of the Covenant or by Treaties registered by the League.

"(2) Exceptional conditions notified as such to the Council of the League of Nations in accordance with the spirit of paragraphs 2 and 6 of Article 8 of the Covenant."

[19] *Records of the First Assembly;* pp. 515-23. [20] *Ibid.,* pp. 519-20.

Mr. Fisher (Great Britain) *rapporteur,* in presenting this report to the Assembly, stated that he could not bind his Government to the acceptance of this plan. Mr. Barnes (Great Britain) on the contrary, welcomed the report and chiefly paragraph (e) of the Third Resolution concerning which he said:[21]

"That, it seems to me, is the most important thing in this document. We have at last got a competent body to recommend a sort of jumping-off place, a place where you can start from. We shall cease an era of talk and begin really to do something."

Mr. Bourgeois (France) strongly objected to paragraph (e), stating that military budgets could not be compared and that countries like France, obliged to reconstruct military material destroyed during the war could not thus be bound.[22] Due to British and French reservations, paragraph (e) was therefore passed as a recommendation on a majority vote, while the rest of the report was adopted as a resolution (2). On February 25th, 1921, M. Bourgeois reported to the Council on the resolutions of the Assembly and recommended: (1) That the Council set up a Temporary Mixed Commission consisting of: "6 persons of recognized competence in political, social and economic matters;[23] 6 members of the Permanent Advisory Commission for Naval, Military and Air Questions selected by this Commission; 4 members of the Provisional Economic and Financial Commission selected by this Commission; 6 members of the Governing Body of the International Labour Office, of which three members shall be employers and three representatives of workmen, selected by the Governing Body of the Office."

(2) The Secretary-General was requested to urge member states, signatories of the St. Germain Convention, to ratify their signatures without delay and to request member states, not signatories to the Convention, to adhere.

(3) The International Office provided for under the Convention was to be temporarily entrusted to an existing office of similar scope at Brussels.[24]

[21] *Records of the First Assembly;* p. 511.

[22] Viscount Cecil found a way out of the difficulty as follows:

"May I suggest this possible course—that it should be put as a resolution first? If there is any Member of the Assembly who votes against it, and it therefore fails as a resolution, it then can be put as a recommendation." *(Records of the First Assembly;* p. 531.)

[23] *Official Journal,* March-April, 1921; p. 148.

[24] The *Bureau International* at Brussels was established in July, 1920, and attached to the Belgian Ministry of Foreign Affairs. It collected information on traffic in slavery, arms and spirituous liquors.

(4) The Permanent Advisory Commission and Temporary Mixed Commission were to study jointly private manufacture of war material.

(5) The Secretary-General was to form a civil secretariat for the Temporary Mixed Commission and this secretariat, together with the secretariat of the Permanent Advisory Commission, was to form one section of the Secretariat of the League.

(6) The Permanent Advisory Commission was to study mutual verification and exchange of information, should such verification be rendered admissible by amendment to the Covenant.

(7) The Secretary-General was to send out to member states paragraph (e) of Resolution 3 of the Assembly which, it will be remembered, had been passed only as a recommendation.

It will be observed that by this resolution, the subject of disarmaments was divided between the Secretary-General, the Permanent Advisory Commission and the Temporary Mixed Commission. The Secretary-General was entrusted with three tasks: (1) the nomination of certain members of the Temporary Mixed Commission; the formation of the civilian secretariat from which, together with the secretariat of the Permanent Advisory Commission, a disarmament section of the Secretariat of the League was to be organized; (2) to urge ratification of the Arms Traffic Convention of St. Germain; and (3) to send out the recommendation of the Assembly on the reduction of military budgets and request the opinion of member states thereon.

The first task was accomplished, and on June 27th, the Secretary-General reported to the Council that all appointments for the Temporary Mixed Commission had been completed, with the exception of the three nominees of the employer members of the Governing Body of the International Labor Office who had stated that they found no authority for such nomination in the Treaty. The Secretary-General, thereupon, acting under instructions of the Acting President of the Council, invited three industrial representatives (one Czechoslovak, one Dane and one Canadian) to sit with the Temporary Mixed Commission. The Section of the Secretariat was established under M. Attolico, Under-Secretary-General.

The second and third tasks of the Secretary-General were not so successfully completed. Notes were dispatched to signatories of the St. Germain Convention, urging their ratification; and to members of the League, non-signatories to the Convention, urging their adhesion. By September, 1923, only three of the original signatories,

China, Greece and Siam, had ratified, while the following additional states had adhered: Brazil, Bulgaria, Chile, Finland, Guatemala, Haiti, Peru, Venezuela.[25]

The recommendation of the Assembly for the limitation of military budgets was forwarded in another note dispatched by the Secretary-General on March 8th, 1921. Twenty-three states replied to this note, but most of the replies were vague and contained reservations and such phrases as "not to be regarded as a formal understanding," "it is extremely difficult to give formal assurance," or "the * * * * Government is prepared to adhere to this recommendation in principle.[26] The work of the Permanent Advisory Commission, in pursuance of the resolution of the Council of February 25th, 1921, may be summed up as follows:

Concerning the right of investigation under Article 213 of the Versailles Treaty, the Commission proposed that, should the Council desire to exercise this right, the Commission would appoint from among its members one delegate from each state represented on the Council;[27] the Committee thus constituted would elect its President with the approval of the Council; its report would be addressed to the Council, which was to be notified of any difficulties encountered in the course of the investigation; expenses should be allocated according to whether the investigation was justified or not; and the Council was also requested to consider the financial measures necessary to permit investigation.[28] On the subject of private manufacture of war material, the Permanent Advisory Commission decided to wait until it had been informed of the program of the Temporary Mixed Commission. On the question of the interchange of information the Permanent Advisory Commission decided that their questionnaire submitted to the Council in December, 1920, covered the subject, but the time was not favorable to send out such questionnaires. The commission stated:[29]

"There is also reason to observe that this information will not willingly be given by the States concerned until all the Great Powers have become Members of the League of Nations."

As to mutual verification, the Permanent Advisory Commission submitted the following opinion:[30]

[25] *Annex to the Supplementary Report to the Fourth Assembly;* p. 8.
[26] For text of notes see *Official Journal,* July-August, 1921; pp. 445-467.
[27] *Official Journal,* September, 1921; p. 753.
[28] This the Council failed to do on the ground that it was "impossible to foresee" whether it would be necessary to exercise the right of investigation.
[29] *Records of the Second Assembly;* p. 152. [30] *Ibid.*

"According to Article 8 of the Covenant, the Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes. In view of this undertaking, it appears superfluous and futile to set up a new system of supervision for the nations which have already signed that declaration. If the good faith of such an interchange of information is open to suspicion would not a similar doubt arise in regard to the information which would be supplied by this organ of control?

"Every nation is sovereign in its own territory, and it would itself direct any investigation which might be carried out there. The good faith of these investigations will therefore be just as liable to suspicion as its own statement had been."

The Permanent Advisory Commission, in addition, reported to the Council on the military, naval and air status of Esthonia, Latvia and Lithuania, applicants for admission to the League.

The Temporary Mixed Commission began its work in July, 1921, and divided into three sub-commissions: (1) for the study of traffic in arms and manufacture of war material; (2) for right of investigation and mutual control; and (3) statistical enquiry. It thus included in its agenda all questions of disarmament, irrespective of the Council resolution of February 25th, 1921. It will be observed that in addition to the military Advisory Commission, with members responsible to their respective governments, there had been constituted a civil commission, with members responsible to the League; that six members of the military commission were also members of the civil commission and the secretariat of the two commissions was mutual. There was no distinct line drawn between their respective competences except that the military commission was to deal with technical questions. The Permanent Advisory Commission worked out a plan on the basis of which the Council might exercise its right of investigation, but the Council delayed examining the important question of expenses connected with such investigation; the Commission prepared a questionnaire for statistics on the armaments of countries but neither the Council nor the Commission considered the time propitious to send out such questionnaires; the Commission also advised against the plan of mutual verification by states, considering this an infringement of state sovereignty. The Temporary Mixed Commission at the same time established subcommissions to study all three of the above questions, together with some additional subjects.

DISCUSSION IN THE SECOND ASSEMBLY

When the record of the work on disarmament was submitted to the Second Assembly, it called forth the following criticism from Viscount Cecil:[31]

"I must, in honesty, add that the report of progress so far achieved, as set out in the report of the Council, is not one to give much satisfaction. The Assembly will know that there are two subordinate bodies which have been preparing work for the Council and the Assembly during the past year. One of them is the Permanent Armaments Commission created under Article 9. I confess that the record of the activities of that body, as set out in the report, is disappointing. I am afraid it is almost true to say that they have made no constructive suggestions toward disarmament during the whole term of their existence; and I think it is a matter for the very serious consideration of the League whether the continuance of that body is really performing any useful service."

Since the Temporary Mixed Commission had held but a limited number of meetings, it could report no results, but the sympathy of the Third Committee and of the Assembly appears to have been with it according to the resolutions passed by both bodies. These were as follows:[32] (1) The Temporary Mixed Commission was asked to continue the work it had begun; (2) the Temporary Mixed Commission was requested to make proposals "on general lines for the reduction of national armaments." These proposals were to be embodied in a draft treaty to be presented to the Council and to the next Assembly. For the purpose of drawing up this Treaty the Commission was to be strengthened. (3) A statistical investigation into the armaments of countries was to be made. (4) The Temporary Mixed Commission was asked to continue the examination of private manufacture of arms and of trade in arms. (5) The Council was requested to invite all members and non-members of the League to an International Conference on the Private Manufacture of Arms, to meet before the session of the next Assembly. The Temporary Mixed Commission was to prepare the program of such Conference. (6) Signatories to the Arms Traffic Convention of St. Germain were to be urged to ratify such convention, and the Assembly expressed its desire that this subject be dealt with at the forthcoming Disarmament Conference at Washington. (7) The Council was requested to prepare a draft protocol "for excluding the import of arms and ammunition in time of peace from countries in which traffic is uncontrolled;" the Temporary Mixed Commission was, at the same time, to consider steps for the destruction of surplus stocks of munitions.

[31] *Records of the Second Assembly;* p. 65.
[32] *Records of the Second Assembly;* pp. 647-49.

(8) Member states were again requested not to exceed the sum total of their present budgets for military, naval and air expenditure in the next two financial years. (9) The Temporary Mixed Commission, together with the Permanent Advisory Commission, was asked to examine "whether it is advisable to address an appeal to the scientific men of the world to publish their discoveries in poison gas;"[33] (10) The Assembly stated its conviction that propaganda for the reduction of armaments should be carried out in all states.

The scope of these resolutions was control of traffic in arms and reduction of military budgets, propaganda for disarmament and against the use of poison gas. Resolution 2 was however, more important for therein the Second Assembly laid the foundation for the Treaty of Mutual Assistance.

POSITION OF THE PERMANENT ADVISORY COMMISSION

The Permanent Advisory Commission was mentioned but once in the foregoing series of resolutions and the work begun by that Commission was transferred to the Temporary Mixed Commission. On the subject of Resolution 2, M. Schanzer (Italy) a member of the Permanent Advisory Commission, observed that it created a conflict between the two bodies; while M. Reynald (France) observed that the Resolution was in conflict with Article 8 of the Covenant.

The Permanent Advisory Commission, thus criticized and ignored, protested to the Council in a note which pointed out that the Commission had acted in an advisory capacity to the Council on every question submitted to it; that the Council, acceding to the request of the First Assembly, had created the Temporary Mixed Commission "to coordinate its work with that of the technical organizations and especially with that of the Advisory Commission on Military, Naval and Air Questions."[34] The note then stated:

> "It seems that certain Members of the Temporary Commission on Armaments lost sight of these considerations when they opposed the right of Members of the Permanent Advisory Commission to be spokesmen for their Commission."

Finally, the note requested the Council to define the "role of mandatories assigned to delegates of the Permanent Advisory Commission sitting on the Temporary Mixed Commission on Armaments and to

[33] On the subject of this resolution M. Lange (Norway) observed that he doubted whether the League ought to study the question of rendering war more humane. *(Records of the Second Assembly,* Committees, Vol. I; p. 337.)

[34] *Official Journal,* December, 1921; p. 1136.

insist on the close relations which should exist between the Permanent Advisory Commission and its delegates."

In answer to this protest the Council replied that it had the highest appreciation of the work of the Commission; but with regard to the role of members of the Permanent Advisory Commission who were also on the Temporary Mixed Commission, the President of the latter would have to be consulted before reply was given. This question appears to have given rise to lengthy discussions. The Temporary Mixed Commission requested that the Council decide, and the Secretary-General, in a memorandum dated March 22nd, 1923, stated the point at issue:[35]

"Whether the position of these six members of the Temporary Commission is, like that of all other members of this Commission, purely personal, freed from all responsibility either to their Governments or to the Commission which appointed them, or whether their position is that of delegates of the Permanent Commission, bound by the decisions of the latter?"

An answer was given in a report and resolution of M. Salandra (Italy) which was adopted by the Council on April 11th, 1923. The resolution stated that:[36]

"The Council having considered the question of the status of the members of the Temporary Mixed Commission, who were nominated by the Permanent Advisory Commission, of which they are also members;

"Decides that the military and naval members of the Temporary Mixed Commission nominated by the Permanent Advisory Commission sit on the Temporary Mixed Commission in virtue of their personal competence and not as delegates of the Permanent Commission."

The work of the Permanent Advisory Commission thus appears to consist of an examination of the military status of applicants for admission to the League; examination of strategic questions connected with boundary disputes;[37] and of technical examinations of questions referred to it by the Temporary Mixed Commission. The members of the Permanent Advisory Commission, sitting with the Temporary Mixed Commission, appear accordingly to be responsible to their governments for technical work and criticism applied to propositions which they assist in drawing up although not acting in a capacity of responsibility to their governments.[38]

[35] *L. of N. Document,* C. 209, 1923; IX.

[36] *L. of N. Document,* C. 256, 1923; IX.

[37] See Chap. XIV; p. 303; Hungarian-Czechoslovak Boundary, for example.

[38] This rather detailed description of the work of these Commissions has been deemed necessary in explanation of the delay in securing any relief from the burden of armaments or putting into constructive use Articles 8 and 9 of the Covenant. The record indicates over-organization, interminable discussions, and

THE WORK OF THE TEMPORARY MIXED COMMISSION

Under the foregoing resolutions, the Temporary Mixed Commission was charged: (1) with the preparation of a treaty for the reduction of armaments; (2) investigation of armaments, of military budgets and of poison gas; and (3) traffic in arms including private manufacture, ratification of the St. Germain Convention, and draft protocol for the control of traffic and examination of surplus stock.

(1) At its meeting on February 20th, 1922, the Temporary Mixed Commission rejected in principle the idea of a treaty, but considered certain proposals submitted by Lord Esher for the reduction of land armaments and a draft resolution of Rear Admiral Segrave concerning the extension of the Washington Naval Agreement to states, members of the League, but not signatories to the agreement.[39] In July, 1922, Viscount Cecil added certain proposals for a Treaty of Mutual Guarantee to those of Lord Esher.[40] The proposals were referred for technical examination to the military, naval and air commissions, respectively, of the Permanent Advisory Commission;[41] and also to a special committee of which Viscount Cecil was made chairman. Lord Esher's plan consisted of a series of resolutions on the restrictions of standing armies, fixed by a ratio following the example of the Washington Naval Treaty.[42] It suggested that the Permanent Advisory Commission should be strengthened and that this body should report to the League any infringements upon restrictive provisions. The plan was not approved by the Special Committee. With regard to the naval restrictions, the sub-committee of the Permanent Advisory Committee reported, and the Temporary Mixed Commission agreed, to suggest to the Council the convocation of an

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friction, whereby one organization either duplicates or counteracts the work of the other, and leads to the conclusion that the subject of disarmament is beyond the capacity of the Council and may lead—as Premier MacDonald has suggested—to a special conference of nations. It presents an illustration of the fundamental difference between American and European methods, wherein the former undertake to deal expeditiously with a concrete situation reduced to propositions which admit of practical solution, while the latter undertake to regulate world conditions which, having no identity of interest or of objective, do not lend themselves to wholesale control of an academic nature.

[39] *Official Journal,* May, 1922; p. 404.

[40] Viscount Cecil's proposal is hereinafter examined under the Treaty of Mutual Assistance. (Chap. XXXVII; p. 718.)

[41] *Official Journal,* August, 1922; p. 982.

[42] The ratio proposed by Lord Esher was: taking 30,000 men as the unit: Belgium 2, France 6, Great Britain 3, Italy 4, Czechoslovakia and Roumania each 3, Switzerland 2, Netherlands 3. *(Records of the Third Assembly,* Minutes of the Third Committee; p. 68.)

international conference for the extension of the Washington Naval Treaty.

(2) The organization of a statistical enquiry of armaments was undertaken by the Secretariat. It was divided into two sections: (a) work to be done outside the Secretariat. (b) Work to be done in the Disarmament Section. The work outside the Secretariat consisted of drawing up statements on the "financial situation and military expenditure" of various countries; the work of the Secretariat, undertaken with the help of the Economic and Health Sections, was to collect data on the following:[43]

"(a) A series of complete statistics for each State on production, commerce, railway and shipping traffic, bank reserves, circulation, deposits, exchange rates, turnover at the clearing-houses, etc.;

"(b) Demographic statistics on the population of States, including figures regarding sex, age, profession, territorial distribution, birth and death rates, result of medical inspection for military service, emigration, etc.;

"(c) Statistical data on military organization, strength with the colours, permanent staff, armaments, etc."

This complicated method was chosen "to establish a comparison between the armed forces of the different states." The results consisted of a series of statements received from twenty-four countries.[44] The contents of these statements vary: some concern chiefly the size and geographical situation of the country; others give complete military data. Nevertheless, it appeared to the Temporary Mixed Commission that these replies constituted a first step toward the exchange of information provided for in Article 8 of the Covenant and it adopted a resolution as follows:[45]

"The Temporary Mixed Commission begs the Council to consider whether the time has not come to discuss the application of the paragraph of Article 8 of the Covenant relating to the exchange of military information between the States Members of the League."

Concerning military budgets, a comparative table was compiled from the information received for the years 1921 and 1922.[46] Owing to the fact that many states had not replied or had not submitted complete information, the table was necessarily incomplete and led to no definite conclusions. The Commission merely stated that "on the whole" a reduction could be observed, but consideration had to be

[43] *Official Journal*, February, 1922; p. 174.
[44] *Records of the Third Assembly*, Minutes of the Third Committee; pp. 87-126.
[45] *Ibid.*, p. 66.
[46] *Ibid.*, pp. 82-86.

given to the fact that much of this was due to demobilization since 1920.[47]

On the subject of poisonous gases (Res. 9) the Temporary Mixed Commission at its meeting in July, 1922, requested the assistance of the Committee on Intellectual Cooperation, to make recommendations as to how "scientific men might be enlisted in order to carry out the Resolution of the Assembly."[48] The Committee on Intellectual Cooperation, however, confessed its inability to advise on this subject. The Temporary Mixed Commission accordingly stated its opinion to be that "no useful purpose would be served" by following the Resolution of the Assembly.[49] Viscount Cecil had, however, submitted a suggestion that existing publications should be used for a comprehensive statement on poisonous gases and chemical warfare, in order to make these subjects better known to civil populations.[50] This question was entrusted by the Temporary Mixed Commission to a small sub-committee.

(3) With regard to the private manufacture of armaments and trade in arms, the Temporary Mixed Commission requested the Permanent Advisory Commission and the legal section of the Secretariat "to study questions of a technical and legal character relating to the definition of war material and to the private manufacture of armaments." [51] The legal section of the Secretariat submitted a preliminary report on the questions arising out of Article 8, based upon these reports and upon technical studies by members of the Temporary Mixed Commission. A draft convention was drawn up, the main points of which were that government license shall be necessary for the private manufacture of munitions, the license to be issued only under certain restrictive conditions, the breach of such conditions to be punishable by withdrawal of the license. But the Temporary Mixed Commission held that the Arms Traffic Convention of St. Germain was closely connected with the above subject and that no restriction of private manufacture would be possible until the traffic in arms was regulated. Therefore, it urged the Council to request signatory States to ratify this Convention.[52] On July 21st, 1922, the Secretary-General received a communication from the Secretary of State of the United States, containing the information that the United States would be unable to "approve the provisions of the St. Germain Convention and

[47] *Records of the Third Assembly,* Minutes of the Third Committee; p. 61.
[48] *Official Journal,* August, 1922; p. 979.
[49] *Records of the Third Assembly,* Minutes of the Third Committee; p. 76.
[50] *Ibid.* [51] *Official Journal,* April, 1922; p. 317. [52] For results see p. 691.

to give any assurance of its ratification."[53] Since this note made it apparent that the Principal Allied Powers would not ratify the Convention, the Temporary Mixed Commission proposed a new examination of the whole question.

The provisions of the resolution for a draft protocol for control of traffic were covered by the previous two subjects (private manufacture of arms and traffic convention); and the examination of the questions of surplus war material was submitted to the Permanent Advisory Commission which reported that the question had already been settled by the various countries concerned.[54]

Such was the record of the work of the Temporary Mixed Commission, submitted in its report for examination by the Third Assembly.

RESOLUTIONS OF THE THIRD ASSEMBLY

This Assembly passed a series of sixteen resolutions with regard to the work of disarmament.[55] They provided as follows: (1) The existence of the Temporary Mixed Commission was prolonged for another year; at the same time the Assembly expressed "its sense of the great value of the collaboration that has existed between the Temporary Mixed Commission and the Permanent Advisory Commission."

(2) On the subject of armaments and military budgets the Assembly passed the following resolution:

> "The Assembly recommends that, as a preliminary step, the European States existing before the war of 1914, under their present description, whose juridical status has not been altered by the war, and which are not, at the moment, engaged in military operations which justify their armaments, be invited to reduce the total of their military, naval and air expenditure to the figures of 1913, calculated on the basis of pre-war prices according to the method employed by the Temporary Mixed Commission."

(3) Satisfaction was expressed with the progress made in the statistical work, and a suggestion was made that statistics henceforth be limited to peace time armaments and expenditure. The Assembly also considered that the Permanent Advisory Commission should collaborate in that part of the work which dealt with technical military, naval and air questions. (4) Surplus stocks and arms could only be controlled by international control of arms traffic. (5) The proposition of the Temporary Mixed Commission for an international

[53] *Records of the Third Assembly,* Minutes of the Third Committee; p. 81.
[54] *Ibid.,* p. 75.
[55] *Records of the Third Assembly;* Vol. I; pp. 287-292.

agreement to control private manufacture of arms was approved. (6) The Assembly expressed its desire that the United States formulate its objections to the St. Germain Convention; that the Temporary Mixed Commission prepare a new scheme for the control of traffic in arms; and that the Council take the necessary steps for both purposes. (7) The Council and the Temporary Mixed Commission were requested to give the fullest publicity to the report of the sub-committee on chemical warfare. (8) The Assembly stated that it attached the utmost importance to the replies submitted by states as to their requirements for their national security; and recommended that the Council request answers from those members of the League which had not yet submitted such reply. (9) The Assembly approved the recommendation of the Temporary Mixed Commission that the Council should discuss the exchange of military information provided for in Article 8 of the Covenant. (10) Satisfaction was expressed concerning the work of the Washington Naval Conference. (11) Approval was expressed of the plans for discussion of disarmament at the Pan-American Congress planned for March, 1923. (12) The Assembly recommended that an International Conference be summoned to which all states, including non-members of the League, should be invited for the consideration of the extension of the Washington Treaty. (13) The Temporary Mixed Commission was instructed to continue its investigation of the general principles of land and air disarmament with a view to submitting a definite scheme to the next Assembly.

Resolution 14 prepared a basis for the Treaty of Mutual Assistance, as follows:

"(a) The Assembly, having considered the report of the Temporary Mixed Commission on the question of a general Treaty of Mutual Guarantee, being of opinion that this report can in no way affect the complete validity of all the Treaties of Peace or other agreements which are known to exist between States; and considering that this report contains valuable suggestions as to the methods by which a Treaty of Mutual Guarantee could be made effective, is of the opinion that:

"1. No scheme for the reduction of armaments, within the meaning of Article 8 of the Covenant, can be fully successful unless it is general.

"2. In the present state of the world many Governments would be unable to accept the responsibility for a serious reduction of armaments unless they received in exchange a satisfactory guarantee of the safety of their country.

"3. Such a guarantee can be found in a defensive agreement, which should be open to all countries, binding them to provide immediate and effective assistance in accordance with a pre-arranged plan in the event

of one of them being attacked, provided that the obligation to render assistance to a country attacked shall be limited in principle to those countries situated in the same part of the globe. In cases, however, where, for historical, geographical, or other reasons, a country is in special danger of attack, detailed arrangements should be made for its defence in accordance with the above-mentioned plan.

"4. As a general reduction of armaments is the object of the three preceding statements, and the Treaty of Mutual Guarantee the means of achieving that object, previous consent to this reduction is therefore the first condition for the Treaty.

"This reduction could be carried out either by means of a general Treaty, which is the most desirable plan, or by means of partial treaties designed to be extended and open to all countries.

In the former case, the Treaty will carry with it a general reduction of armaments. In the latter case, the reduction should be proportionate to the guarantees afforded by the Treaty.

"The Council of the League, after having taken the advice of the Temporary Mixed Commission, which will examine how each of these two systems could be carried out, should further formulate and submit to the Governments for their consideration and sovereign decision the plan of the machinery, both political and military, necessary to bring them clearly into effect.

"(b) The Assembly requests the Council to submit to the various Governments the above proposals for their observations, and requests the Temporary Mixed Commission to continue its investigations, and in order to give precision to the above statements, to prepare a draft Treaty embodying the principles contained therein."

Resolution 15 laid a foundation for "regional agreements," since the Assembly stated its desire to emphasize their importance and requested the Council to request the Temporary Mixed Commission to consider "the possibility of recommending the conclusion of similar agreements to states which might be concerned." A general conclusion follows:

"The Assembly,

"Considering that moral disarmament is an essential preliminary condition of material disarmament, and that this moral disarmament can only be achieved in an atmosphere of mutual confidence and security:

"Declares that such confidence cannot be attained so long as the world continues to suffer from disorganization of the exchanges, economic chaos and unemployment, and that the only method of remedying these evils is to put an end to the uncertainty which prevails regarding the means for the restoration of the devastated regions and the settlement of the inter-Allied debts;

"Expresses the hope that, in so far as these questions can be regulated by the unaided efforts of the European nations, the Governments signatories of the international treaties and agreements which deal with these questions,

and within the framework of which they must be envisaged, will achieve as soon as possible a general settlement of the problem of reparations and inter-Allied debts;

"And recommends that the Council shall devote constant attention to every effort made in this direction by the Governments concerned, it being understood that it can only usefully assist in the solution of these problems if requested to do so by the Governments in question."

In accordance with these resolutions, the following activities were undertaken: Under Resolutions 1 and 14, a circular letter was sent to Members of the League requesting their opinion on the subject of a Draft Treaty of Mutual Guarantee. To this circular 25 states replied[56]—indicating that some were in favor of a general treaty, while others were in favor of partial treaties (Czechoslovakia); and others stated that they could participate in no Treaty of Mutual Guarantee (Canada). At a meeting of the Temporary Mixed Commission in February, 1923, Viscount Cecil presented the text of a Draft Treaty of Mutual Guarantee for examination. The basis of this Treaty was a general reduction of armaments, following which assistance was to be guaranteed to an aggressed state by all parties to the Treaty. Provisions were made against a state exceeding the armaments permitted, and against an aggressor state. The fact of aggression was to be decided by the Council; an economic and financial blockade was to be applied immediately, and military assistance furnished to the aggressed state under command of the general staff of any state to whom the Council might entrust such task.[57] This proposal was referred to the Permanent Advisory Commission to be examined from a technical point of view, and the Commission stated its opinion that the draft did not "constitute a solid basis for the scheme for the limitation of armaments." To meet this objection, a Draft Convention of Mutual Assistance was prepared by Lieutenant-Colonel Réquin. This draft provided that the contracting parties might conclude between two or more of them agreements for defensive purposes, and then inform the League of the reduction of armaments they considered to be in proportion to the safety afforded them. The parties were to agree on the plan of assistance and also to decide when to put this plan into operation. No state was to be obliged to undertake military obligations on a continent other than its own.[58] These two draft conventions were used by the Temporary Mixed

[56] For text of replies see *Official Journal,* September, 1923; pp. 1073-95.

[57] For text of Treaty see *Records of the Fourth Assembly;* Minutes of the Third Committee; p. 153.

[58] *Ibid.,* p. 164 for complete text.

Commission to prepare a Draft Treaty of Mutual Assistance to be submitted to the Fourth Assembly for examination.

In the matter of investigations, the following action was taken: Under Resolution 2, Lord Balfour at a meeting of the Council on January 31st, 1923, questioned whether the expenditure of a state on armaments was an adequate test by which to judge its military preparedness. It was decided that the Temporary Mixed Commission should draw up the list of states referred to in the Resolution.[59] On the basis of this resolution of the Council, the Temporary Mixed Commission, at its meeting in February, 1923, stated that the Assembly resolution did not cover all exceptions; that the choice of 1913 for a standard was open to criticism; that the standard would not correspond to the actual situation; and that "the basis of the military expenditure for each country can be no other than the sum total of the requirements of its national security."[60] The Council, therefore, on April 21st, 1923, passed a resolution requesting the Temporary Mixed Commission to undertake a fresh study of the question.[61] The Temporary Mixed Commission at its meeting in June, 1923, pronounced itself of the opinion that "it would be advisable to defer for the moment the execution of this resolution and to request the Council to decide whether it is desirable to invite the Assembly to reconsider the question."[62]

Under Resolutions 3 and 9, the Secretary-General was authorized to communicate the statistical tables drawn up for the Third Assembly to Member States, with a request for completion.[63] The Temporary Mixed Commission accordingly continued its work of collecting data and suggested by a resolution in June, 1923, that a statistical yearbook should be published, containing the data thus collected. Notwithstanding protests by M. Hanotaux (France), who objected to the cost involved and stated that the expenditure for states had been worthless the year before, owing to complaints and criticism, and that in 1923 only 29 states out of 52 had replied,[64] the Council decided to adopt the resolution of the Temporary Mixed Commission. In collaboration with the Permanent Advisory Commission, a publication was duly prepared under the title of "Statistical Enquiry into National Armaments," and was distributed to the Fourth Assembly. Under Resolution 8, a circular letter was sent out requesting data

[59] *Official Journal, February,* 1923; p. 209.
[60] *Official Journal,* April, 1923; p. 427.
[61] *Ibid.,* June, 1923; p. 587.
[62] *Ibid.,* July, 1923; p. 719.
[63] *Ibid.,* March, 1923; p. 295.
[64] *Ibid.,* August, 1923; p. 929.

on the requirements of national security of the states which had not as yet replied. These replies appear to be included among those to the circular letter concerning the Treaty of Mutual Guarantee. Under Resolution 7, the Temporary Mixed Commission requested a Committee of Inquiry to collect information from experts of various countries on the subject of chemical warfare.[65] The states, signatories to the Washington Conference, were requested to communicate the reports of their experts on chemical warfare, to be used by the Temporary Mixed Commission.[66]

Concerning the control of traffic in arms, the Council decided that "the prudent course would be to take no action,"[67] in accordance with Resolutions 5 and 6 of the Third Assembly, since such control depended on the ratification of the Convention of St. Germain. This resolution of the Council was discussed at the meeting of the Temporary Mixed Commission in February, 1923; and this body suggested that the Council invite the Government of the United States to make concrete proposals concerning matters on which it might be willing to collaborate with other governments, both for the control of traffic in arms and of the private manufacture of arms. In reply to such request made by the Council, the United States pointed out its particular objections to the St. Germain Convention to be: That the Convention created a system of control by signatory Powers and was not a general limitation of armaments; parties were prohibited from selling military supplies to states which had not adhered to the Convention; new legislation would have to be enacted in the United States; and the provisions of the Convention relating to the League were "so intertwined with the whole Convention as to make it impracticable for this Government to ratify."[68]

Resolution 12 of the Assembly, concerning the convocation of a conference for the extension of the Washington Naval Treaty, was approved by the Council, but action was to be deferred until after the Pan-American Conference in March, 1923. Since the resolutions passed by this Conference with reference to disarmament were chiefly reiterations of the provisions of the Washington Conference, it did not appear to be a basis for the work of a further general conference. The Council decided, however, at its meeting in August, 1923, to entrust to the naval sub-commission of the Permanent Advisory Commission the calling of a meeting of naval experts—also from non-

[65] *Official Journal,* April, 1923; p. 425.
[66] *Ibid.,* August, 1923; p. 573.
[67] *Ibid.,* March, 1923; p. 294.
[68] *Official Journal,* November, 1923; p. 1471.

member states—for the purpose of studying the extension of the Washington Treaty.

THE FOURTH ASSEMBLY

The agenda of the Third Committee of the Fourth Assembly included: a discussion of the Draft Treaty of Mutual Assistance; and a discussion of the other work of the Temporary Mixed Commission. It is here proposed to deal with the second part of the agenda,[69] namely the question of statistical enquiries into expenditure, and armaments, together with exchange of information; also the study of chemical warfare; the question of private manufacture of arms and control of traffic; the extension of the Washington Naval Treaty; and, finally, the renewal of Resolution 15 of the Third Assembly on regional agreements. On these subjects, the Assembly passed seven resolutions;[70] of which the following is a summary.

(1) The Council was requested to submit the Draft Treaty of Mutual Assistance to the governments for their consideration. (2) States were requested not to exceed their present budgets in their expenditure for armaments during the time that a plan for the limitation of armaments was in preparation. (3) Approval was expressed of the Year Book of Statistical Information. (4) It was recommended that the Temporary Mixed Commission should be invited to prepare a new convention to replace the St. Germain Convention for the control of traffic in arms, and the new convention was to be drawn up in a form to be acceptable to the governments of all countries which produce arms and munitions. Alternative proposals were to be furnished, acceptable to some powers, in the event that others refused to approve the convention. The Temporary Mixed Commission was requested to submit a scheme for the control of private manufacture of armaments to the Economic Committee of the League, and when both plans—for control of arms traffic and private manufacture—were complete the Council was to consider the summoning of an international conference. (5) The request of the Third Assembly for publicity of reports on chemical warfare was repeated. (6) Resolution 15 of the Third Assembly concerning promotion of partial agreements for the reduction of armaments was reiterated. (7) The existence of the Temporary Mixed Commission was prolonged for another year; but the Council was requested to regulate the work of the Temporary and Permanent Commissions

[69] For discussion of first part of the Agenda, see Chap. XXXVII; p. 718.
[70] *Records of the Fourth Assembly;* p. 154.

"in anticipation of the possible expiration of the mandate of the Temporary Mixed Commission at the Next Assembly." [71]

STATUS OF THE WORK OF THE LEAGUE ON DISARMAMENT

It will be observed that among the seven resolutions passed by the Fourth Assembly, one is new and constructive, namely, Resolution 4, laying down a program for work to be undertaken in connection with the control of arms traffic. The Council undertook action in this respect at its meeting in December, 1923. A letter was sent to the United States inviting it to co-operate with the Temporary Mixed Commission.[72] In reply to this note, Mr. Grew, United States Minister at Berne, was authorized to attend the meetings of the Temporary Mixed Commission. At its meeting in February, 1924, the Commission referred the task of redrafting the Convention of St. Germain to a sub-committee, to meet in Paris under the chairmanship of M. Lebrun. The sub-committee met in March, 1924, and prepared a new convention, under which traffic in arms is to be subject to a system of government licenses, which, in turn, are to be controlled by an international office or commission to be established by the Council of the League of Nations.

At a further meeting held in April, 1924, at Prague, the sub-committee discussed the control of private manufacture of arms. The sub-committee decided to "confine its efforts to the national control of the private manufacture of arms." [73] The Permanent Advisory Commission was requested to draw up a list of materials which are to be subjected to control which is to take place through government licenses. The plans for control of arms traffic and of private manufacture of arms were submitted to the Permanent Advisory Commission for its technical advice. The Council, at its meeting in March, 1924, also authorized the Secretariat to collect and publish, before the meeting of the next Assembly, information on the import and export of arms and munitions in all countries whether members of the League or not, for the purpose of facilitating the work of the Fifth Assembly.

In pursuance of resolution 12 of the Third Assembly, a conference

[71] At a meeting of the Third Committee of the Fourth Assembly on September 25th, 1923, Col. Réquin (France) raised the question whether it was advisable to entrust the duties mentioned in the resolutions of the Assembly to the Permanent Advisory Commission whose members "did not represent any government." He stated that the task of the Commission had been the preliminary work of investigation but that it was competent neither to redraft the St. Germain Convention nor to "draw up a concrete plan" for the reduction of armaments as provided in the Treaty of Mutual Assistance. *(Records of the Fourth Assembly,* Minutes of the Third Committee; p. 73.)

[72] *Official Journal,* February, 1924; p. 378.

[73] *L. of N. Monthly Summary,* April, 1924; p. 74.

of naval experts was held at Rome in February, 1924, for the purpose of extending the Washington Treaty. In addition to the members of the naval sub-commission of the Permanent Advisory Commission, delegates of Argentina, Chile, Denmark, Greece, Norway, the Netherlands and Russia were present. Turkey, although invited, did not attend.[74] The Conference reached no conclusions owing, it appears, to the high demands of Russia, which country desired 400,000 tons as a limit (while the tonnage of France and of Italy is fixed by the Washington Conference at 175,000); and to the position taken by the South American powers, namely that Argentina and Chile were unwilling to reduce their tonnage unless Brazil did the same, and Brazil refused. It appears that a further technical meeting is to take place. The report of the naval sub-commission was sent out to all states, members or not, of the League, with a request for further suggestions.

ARMAMENTS

The foregoing being a record of the efforts on behalf of disarmament, it is important to observe what was taking place during this time in the matter of armament.

In 1922, Great Britain submitted the following table to the League of Nations, showing the relative military strength of the leading countries:[75]

Country	Area in square miles	Area including Foreign Possessions	Estimated man-power (white only)	Forces maintained in Peace	Ratio of all troops to area including Foreign Possessions	Percentage white troops to white man-power
Belgium	11,373	930,000	1,200,000	130,000 men	1 man– 7 sq. m.	10.8%
France	213,000	4,550,000	5,500,000	792,000 "	1 " – 5.7 " "	10.1%
Germany	180,000	180,000	9,000,000	100,000 "	1 " – 1.8 " "	1.1%
Italy	115,000	725,000	7,900,000	175,000 white 25,000 native 200,000 total	1 " – 3.6 " *	2.2%
Japan	140,200	247,067	12,900,000	256,000 men	1 " – .9 " *	2 %
Russia	7,462,000	8,172,000	15,000,000	1,267,000 "	1 " – 6.4 " *	8.4%
United States	3,026,800	3,743,300	23,900,000	150,000 "	1 " –25. " *	.625%
Great Britain[75]	121,633	5,897,149	7,650,000	225,000 regular 190,000 territ. 178,800 native 593,800 total	1 " –10. " "	3.9%

[74] The reason given, as reported, was that Turkey considered itself technically still at war, since the Lausanne Treaty had not yet been ratified.

[75] In 1922 these forces were distributed as follows: Colonies, 14,400; Egypt and the Soudan, 32,700; India, 217,000; the mandated country of Irak, 10,000;

It appears, therefore, that France, Italy, Russia and Great Britain had, in 1922, an army of 2,852,000 men to maintain peace in Europe or in their various possessions. There is no evidence of substantial reduction since that time. To this total of the Great Powers, there should, however, be added over one million for the other countries of Europe, distributed approximately as follows:[76] Albania, 10,600; Austria, 30,000; Belgium, 132,800; Bulgaria, 19,800; Czechoslovakia, 163,600; Denmark, 11,000; Esthonia, 20,100; Finland, 30,900; Greece, 86,400; Hungary, 35,000; Latvia, 19,100; Luxemburg, 400; Netherlands, 75,600; Norway, 2,400; Poland, 260,000; Serb-Croat-Slovene Kingdom, 115,700; Sweden, 36,000; Switzerland, 106,600.[77] It is practically impossible to obtain reports with regard to the military preparedness of states. It has been stated that the statistics compiled to this end by the League are as yet incomplete, and they furnish but an indication of the trend of military preparations.

A specific example of the heavy burdens carried by states for the maintenance of their security is afforded by France. In a report submitted to the League in 1922, it stated its obligations, as follows:[78] Occupation of the Rhine, 92,000 men; maintenance of order in the Saar, 8,000; maintenance of order in Upper Silesia and Memel, 10,000; occupation of Constantinople and the Straits, 8,000; mandates for Syria, the Cameroons, and Togoland, 42,000; protection of Colonial Empire (Morocco, Algiers, Tunis, etc.), 230,000; internal order in France, 335,000. The budget for expenditure on armaments of France for 1923-24 is reported as 4,595,002,335 francs.[79] In addition to expenditure on her own armament, France also undertook to assist in the armament of other states. For this purpose on December 5, 1923, the Finance Commission of the French Senate approved a loan of 400 million francs to Poland, 300 millions to Yugo-Slavia and 100 millions to Roumania. The first two loans have been negotiated and the Yugoslav and Polish armies are completing their equipment with French material aid; French military advice is also furnished since

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the Rhine and Plebiscite areas, 10,000, and Constantinople, 7,800; leaving a force of 301,300 men for other purposes.

[76] *Records of the Third Assembly,* Minutes of the Third Committee; p. 105.

[77] In this list there are not included Roumania, Portugal and Spain, these countries not having furnished the information requested by the League. The figures are taken from *L. of N. Statistical Inquiry into National Armaments,* Document A 20, 1923, IX; and from *Records of the Third Assembly,* Minutes of the Third Committee; pp. 87-126, and are rounded downward to the nearest hundred.

[78] *Records of the Third Assembly,* Minutes of the Third Committee; p. 99.

[79] *Le Matin,* January 26th, 1924.

high French military personages have visited these countries lately with a view to rendering their armies more efficient.[80]

The land forces of the Great Powers have not been effectively reduced, and the air forces are being effectively strengthened. A table submitted by Great Britain to the League shows the aeroplane strength of the leading European countries in 1922 to have been: Great Britain, 368, no airships; Belgium, 200; France, 928 and 13 airships; and Italy, 454, and 2 airships.[81] Press reports from London of March 7th, 1924, however, state that in 1924-25 the strength of officers and men in the British air service is to be increased from 2,000 to 35,000, eight new squadrons are to be formed and the estimated expenditure is £19,392,000 gross (an increase of £787,000). When the program is completed Great Britain will have 650 airplanes, which is still only half of the present estimated strength of France. It was reported to the British Parliament that the greatest weight of bombs dropped on London, in a single month, during the war, was twelve tons; now, according to the equipment of other countries, two hundred tons could be dropped on London in twenty-four hours.

On January 1st, 1923, the tonnage of the Great Powers was reported as follows:[82] France, 194,275; Great Britain, 740,521; Italy, 147,000; Japan, 358,730; [83] and efforts have been made to extend the provision of the Washington Conference.[84]

There is no index available concerning the experiments in bacteriological and chemical means of warfare, which of necessity are conducted with secrecy in each country and do not lend themselves readily to either control or inspection. Fabulous inventions are reported, designed for use in the next war—such as 4,000-pound bombs, ten times larger than the largest bomb used in the World War, and electric "death rays" that can stun or kill a whole army or put fire to whole cities.

Unquestionably, the year 1924 finds the Allied Powers leading in the policy that armament is the first principle of national security. No one questions but that security in Europe rests in theory and in fact upon a military foundation; and upon national preparedness to fight. More disquieting indications of the general trend toward armament are found in the less important or neutral states. The three Scandinavian

[80] The Chief of Staff of the Czechoslovak Army is reported to be a French general.

[81] *Records of the Third Assembly,* Minutes of the Third Committee; p. 105.

[82] *L. of N. Document A. 20,* 1923; IX.

[83] See p. 682 for tonnage agreed to at Washington Conference.

[84] For attempted extension of the Washington Naval Treaty by the League of Nations at the Naval Conference at Rome, see p. 705.

countries, among the most peaceful in Europe, spent £14,280,000 in 1922 on naval and military armaments, and Switzerland is reported to have under consideration the reorganization of its army. Finland is developing the idea of a "machine army" made up of armored cars, tanks and other mechanical equipment. In Sweden a reorganization of defense is taking place and in Denmark a Council of Defense was created in August, 1923, which will make more effective the cordination of the military and naval departments.

A circumstance has been brought to light through a series of inquiries addressed to the British Under-Secretary of Foreign Affairs by the Editor of "Foreign Affairs," which has a sinister side. It relates to the manufacture of arms in Austria. It is alleged that Austria within the year 1923 has turned out one million Mauser rifles and within the first few months of the year 1924 delivered 116 wagon loads of infantry ammunition to Yugoslavia; that the Austrian munition factories at Vienna, the Wollersdorf, Steyr, Hirtenberg, Endresfeld and Blumau have furnished quantities of ammunition to Poland and Roumania. It is also alleged that Austria, which is prohibited under the Treaty of St. Germain, from exporting war material or from establishing new factories, has been permitted to establish five branches of a single state factory in five different places.[85]

It is not without interest to note that countries, whose people are laboring for disarmament, and which have subscribed to the Austrian loan under the League of Nations, may now contemplate the prospect of the funds being used to supply arms to the Little Entente, which is busily engaged in negotiating military alliances for war. At the same time, these countries in receiving ammunition connive in the violation of a treaty; while a Disarmament Commission of the League of Nations is engaged in preparing disarmament plans. The futility of undertaking to regulate warfare is thus brought home to the zealous advocates of disarmament.

MILITARY AND POLITICAL ALLIANCES

Military and political alliances may be considered as a part of the general movement for armaments; or as part of the movement for disarmament. For advocates of disarmament claim that countries which have defensive alliances with each other will be more willing to reduce their armaments, since they will feel strengthened by forming groups; while it is self-evident that a military alliance adds a certain number of

[85] *Foreign Affairs* (British); July, 1924.

men and war material to that at the disposal of a country and thereby greatly strengthens its military preparedness.

That the strongest political alliance among the Allied Powers has not become also a military defensive alliance, is due to the refusal of the United States and Great Britain to ratify the Treaty signed by these two countries and France on June 28th, 1919, guaranteeing France assistance in case of an unprovoked attack by Germany. The efforts of France to have this Treaty ratified or to obtain a new treaty with similar scope from either the United States or Great Britain, have hitherto remained without result. Other combinations in Europe have, however, prepared the way for a return to the system of the balance of power and laid the foundation for blocs within the League of Nations.

The Little Entente, consisting of Czechoslovakia, Yugoslavia and Roumania, was the first bloc created after the war following the example of the Allied Powers in the Supreme Council, and its effectiveness has encouraged other states to combine. The Little Entente Treaty was first negotiated between the Serb-Croat-Slovene State and the Czecho-slovak Republic and signed August 14th, 1920. Subsequently, Roumania signed similar treaties with both countries. The Treaty provides as follows:[86]

"1. In case of an unprovoked attack on the part of Hungary against one of the contracting parties the other party pledges itself to come to the assistance of the party attacked, in accordance with the arrangements set out in Part 2 of the Convention.

"2. The competent authorities of the two countries will decide together the necessary measures for the execution of this Convention.

"3. Neither of the contracting parties may conclude an alliance with a third power without previously informing the other party.

"4. The Convention shall be valid for two years, after which each contracting party shall be free to denounce the Convention, which will remain valid for a further six months as from the date of denunication."

The above Treaty, as may be observed, is directed against Hungary, but the Little Entente does not limit its activity in this direction. At regular intervals representatives of the three countries hold conferences at which they discuss questions of mutual interest, as reparations, claims, policy toward neighboring states, or policy toward Russia.

An impetus was given to alliances in 1921 by the League of Nations when it recognized them as likely to contribute to the progress of the League and therefore to be legitimate under the Covenant. Article 20 of the Covenant provides that member states agree that they will not

[86] *A History of the Peace Conference of Paris,* Vol. IV; p. 519.

enter into any engagement inconsistent with the Covenant. Article 21, however, provides that certain regional understandings or agreements shall not be affected by, or be subject to, the Covenant. At the Second Assembly, an effort was made by China and Czechoslovakia to amend Article 21. Neither amendment was accepted, but an interpretative resolution was adopted on October 4th, 1921, embodying the essence of the proposals by Czechoslovakia. The resolution reads as follows:[87]

"The Committee therefore proposes to the Assembly that Article 21 should be retained in its present form, and draws the Assembly's attention to the fact that agreements between Members of the League, tending to define or complete the engagements contained in the Covenant for the maintenance of peace or the promotion of international co-operation, may be regarded as of a nature likely to contribute to the progress of the League in the path of practical realizations.

"Such agreements may also be negotiated under the auspices of the League of Nations, for example, in special conferences with its assistance."

The effect of this resolution has been to stimulate alliances among the various states by construing them, in effect, to be regional understandings within the terms of the Covenant.[88] Such alliances were further facilitated when the League accepted the principle that technical chapters of military treaties need not be registered nor published.[89] Such alliances exist between France and Belgium; France and Poland; France and Czechoslovakia; and Poland and Roumania. The following is the treaty negotiated between France and Czechoslovakia in 1924, typical of the defensive alliances now being executed:[90]

"Article 1. The Governments of the French Republic and of the Czecho-Slovak Republic undertake to concert together upon external questions of such a nature as to endanger their security and to offend against the order established by the peace treaties, of which both are signatories.

"Article 2. The High Contracting Parties will agree on measures suit-

[87] *Records of the Second Assembly;* p. 831.

[88] On September 27th, 1918, Mr. Wilson laid down certain principles as representing the United States Government's interpretation of its own duty with regard to peace. Among these are the following:

"There can be no leagues or alliances or special covenants and understandings within the general and common family of the League of Nations.

"All international agreements and treaties of every kind must be made known in their entirety to the rest of the world. Special alliances and economic rivalries and hostilities have been the prolific source in the modern world of the plans and passions that produce war. It would be an insincere as well as an insecure peace that did not exclude them in definite and binding terms."

[89] Chap. I; p. 29.

[90] *Manchester Guardian Weekly,* February 1, 1924.

able to safeguard their common interests in case those interests should be threatened.

"Article 3. The High Contracting Parties, fully agreed upon the importance for the maintenance of general peace of the political principles laid down in Article 88 of the Peace Treaty of Saint Germain-en-Laye of September 10, 1919, as well as in the Protocols of Geneva of October 4, 1922, of which both are signatories, undertake to concert together upon the steps to be taken in case of menace to the observance of these principles.[91]

"Article 4. The High Contracting Parties, taking especially into account the declarations made by the Conference of Ambassadors on February 3, 1920, and April 1, 1921, respectively, which will continue to inspire their policy, as well as the declaration made on November 10, 1921, by the Hungarian Government to the Allied Diplomatic representatives, undertake to concert together in case their interests should be threatened by failure to observe the principles enunciated in these various declarations.[92]

"Article 5. The High Contracting Parties confirm their complete agreement on the necessity which makes it incumbent for the maintenance of peace to adopt a joint attitude in regard to eventual attempts to restore the Hohenzollern dynasty in Germany, and undertake to concert together upon the measures to be taken in this contingency.

"Article 6. In conformity with the principles enunciated in the Pact of the League of Nations, the High Contracting Parties agree that, should there arise between them in future controversial questions which could not be settled in friendly agreement and through diplomatic channels, they will submit the dispute either to the Permanent Court of International Justice or to one or several arbitrators chosen by them.[93]

"Article 7. The High Contracting Parties undertake to communicate to each other the agreements affecting their policy in Central Europe which they have concluded previously, and to consult together before concluding new agreements. They declare that, in this respect, nothing in the present treaty is contrary to the above-mentioned agreements and in particular to the treaty of alliance between France and Poland, to the agreements or arrangements concluded by Czecho-Slovakia with the Federal Republic of Austria, with Roumania, with the Kingdom of the Serbs, Croats, and Slovenes, respectively, nor to the agreement recognized by the exchange of letters on February 8, 1921, between the Italian Government and the Czecho-Slovak Government.

[91] Article 88 of the Peace Treaty of St.-Germain-en-Laye relates to the maintenance of the independence of the Austrian Republic.

[92] The declarations of the Conference of Ambassadors and of the Hungarian Government relate to the restoration of the Hapsburg dynasty in Hungary.

[93] Prof. Gilbert Murray, writing to the London *Times*, under date of January 30th, 1924, assumes that this article is equivalent to taking "the first step toward a momentous decision—namely, general acceptance of the compulsory jurisdiction of the Court." This assumption has been reiterated in the United States. It will be observed that in this particular instance, the two states have reserved to themselves an alternative, namely, to select their own arbitrators. The Court, therefore, is but an elective of two methods and this act is very far from accepting that compulsory jurisdiction which is contemplated in Article 36 of the Court Statute.

"Article 8. The present treaty will be communicated to the League of Nations in conformity with Article 18 of the Pact.

"The present treaty will be ratified and the instruments of ratification will be exchanged in Paris as soon as possible."

It will be observed that this Treaty is one of friendship and alliance between the two countries in which they agree to act together (1) when the security of either is menaced; (2) when the order established by the Treaty of Peace is offended; (3) when their common interests are threatened; and (4) to consult each other with regard to their existing agreements and to make no new agreements without consultation. The two parties further agree whenever any differences of opinion arise between them, which they cannot settle by diplomatic negotiations, that they will submit the question, not to the Council of the League, but to the Permanent Court or to arbitrators to be chosen by themselves. It does not appear, under this agreement, that they are willing to submit to arbitration questions which may arise between them and third parties. There is no indication, in the event that this joint agreement proves to be in conflict with the Covenant, that Articles 10 and 16 would take precedence.

Owing to its series of treaties, in the event of aggression, France, apparently without consulting the League, may call into action its own forces, those of Belgium, of Poland and of Czechoslovakia, equalling a force of over one million men. Presumably, also, the forces of these co-operating states cannot be called into general action by the League without the consent of France, as such action might be held to lessen the forces which guarantee its security when they are engaged in other warfare.

Italy has followed the example set by the Little Entente and by France, and has concluded defensive alliances with Yugoslavia and with Czechoslovakia. The former constitutes an Adriatic "regional understanding," is known as the "Pact of Rome" and was signed on January 27th, 1924. It provides as follows:[94]

"(1) The high contracting parties pledge themselves to mutual support and sincere co-operation in upholding the provisions of the Treaties of Trianon, St. Germain, and Neuilly.

"(2) Should one of the contracting parties be subjected to an unprovoked attack on the part of one or more Powers, the second party pledges itself to remain neutral for the whole duration of the conflict, and to afford political and diplomatic support to the party attacked.

"(3) Both parties pledge themselves to it that whenever, on the occasion

[94] *The Near East,* February 14th, 1924.

of international conflicts, the two parties realize that their interests are identical, they will undertake joint protective measures.

"(4) This Convention holds good for five years, but notice of renewal or termination may be given one year before it expires.

"(5) The Treaty comes into force, immediately upon its ratification in Rome."

It will be observed that Italy agrees to maintain the provisions of the three Peace Treaties in relation to Austria, Hungary and Bulgaria and thus to assure the boundaries of the Yugoslav state. If either state, however, is subjected to an unprovoked attack, the other party remains neutral, unless their joint interests are involved; then they will undertake joint protective measures.

The *rapprochement* between Italy and Spain which took place in December, 1923, has thus far resulted in the first of what is alleged to be a series of agreements.[95] The first is a commercial convention entered into between the two states. The second is reported to be diplomatic and in the stage of drafting; while the third is to be strategic and will require the services of military experts. The culmination of this plan would indicate still further the return to the policy of the balance of power, held by groups of states, and would constitute Italy the center of a powerful combination in the Adriatic and Mediterranean Seas, occupying a position not unlike that held by France among Central European states. On the other hand, the Treaty concluded in July, 1924, with Czechoslovakia also assures to Italy a strong position in Central Europe.

The Baltic States—Esthonia, Latvia and Lithuania—having come to the conclusion that they are less secure when each acts alone—agreed upon a policy at their conference held at Kovno in June, 1924. It was unanimously decided by the representatives of the three states:[96]

"(a) To recommend to their governments the co-operation of all three states in the conduct of foreign policy.

"(b) To co-ordinate the procedure of the three states in the League of Nations and other institutions of an international character in matters of common importance.

"(c) In case of necessity, to furnish common support in steps taken abroad."

It is not without interest to note that these states have agreed to unite for action within the League as well as against a common enemy.[97]

[95] Chap. XXXV; p. 655. [96] *Press Dispatches,* June 20th, 1924.

[97] The agreement between these three countries includes co-operation in economic and commercial affairs and also a program for social service which seems to be well nigh forgotten in Europe under the menace of territorial insecurity.

This alliance is the result of a long struggle to form one body which would include Finland, Poland and the Baltic States. A first conference appears to have been held at Helsingfors and a second at Riga, in 1920, delegates from Finland, Esthonia, Latvia and Poland attending. The decisions reached at these meetings, however, remained unratified. A conference held in Helsingfors, in 1921, produced no better results, but at a meeting held, in Warsaw, in 1922, a defensive alliance was drawn up. Esthonia, Latvia and Poland ratified the treaty, but Finland refused on the ground that it did not desire to be drawn into a war between Poland and Germany. In July, 1923, a further conference was held at Riga without positive results, and finally the conference held at Warsaw in February, 1924, led to the discussion of an arbitration convention between these countries. The Scandinavian countries, while co-operating in matters within the League, have not joined military alliances nor are they in agreement upon economic policies; nevertheless, their refusal to join the other Baltic States or Finland, with whom the Aaland Islands decision forms an obstruction, constitutes them a group apart.

These various regional understandings are the beginning rather than the end of a general movement toward blocs in Europe. The situation, therefore, either in being or in process of negotiation, appears to be somewhat as follows:

Little Entente (*Prague*)	French Combine (*Paris*)	Mediterranean Combine (*Rome*)	Baltic States (*Riga*)	Black Sea (*Bucharest*)
Czechoslovakia Yugo-Slavia Roumania	France Czechoslovakia Poland Belgium	Italy Yugo-Slavia Spain	Latvia Esthonia Lithuania	Poland Roumania

There are but two strong states in Europe which are free to act independently of the Treaty of Versailles, of the Covenant and of any defensive alliances. These two countries are Russia and Turkey. While Great Britain has remained aloof from entangling military alliances on the continent, it is a member of the Conference of Ambassadors and of the Council and is not free to pursue an independent course.

What do these military alliances of which the foregoing are the beginning portend? These paper defenses are intended to command the military equipment already described; to provide for their concentration and orientation; to bring nations with common causes of fear

or with common causes of aggression into formations for military action. There is little of an outlook toward peace in these plans for war, which stimulate other combinations to strengthen their arms; and which aim to maintain security through militarism.

It seems incredible that nations in this age of science should regard buffer states and neutral zones and corridors as measures of security against war in view of the certainty that the next war will be chemical and bacteriological and will be fought in the air or underground, where these measures upon which so much time, thought and money have been spent, will prove futile. But that these new alliances, with their clumsy military contrivances and plans for their orientation, will destroy harmony within the League and take priority over any general obligations under the Covenant none can doubt. In the event of a menace of aggression that resort will be had to war without resort to arbitration is a foregone conclusion. That any international organization can direct or control the operation of these special treaties appears as futile as have been the efforts under Articles 10 and 16 of the Covenant. Their growth indicates that the Covenant as a means to prevent war and preserve peace is to be superseded by blocs which rely upon armaments and war for security.

COMMENTARY

From the above record the following appears to be the situation: On the American continent, it has been possible to reach an agreement accepted by the Five Great Powers of the world in principle, even if not put into rigorous practice; and it was also possible to negotiate a Treaty of Disarmament between five small republics, which treaty might serve as a model for larger states. In Europe it has not been possible to reach any agreement upon disarmament, and states have resorted to military alliances which are supposed to furnish security, but which apparently furnish them with an excuse for strengthening their armaments.

The League of Nations, having been entrusted with and having undertaken a comprehensive programme for disarmament, appears to have produced the following results:

(1) A Treaty of Mutual Assistance has been prepared and not accepted by the majority of states, including Great Britain, the United States and Russia.

(2) A draft convention for the limitation of traffic in arms, in existence but not in force when the League was established, has been

discarded, and a new convention has been drawn up, to be discussed at the Fifth Assembly.

(3) Efforts have been made to extend the Naval Treaty of Washington to states non-members of the League, as well as to member states not signatory to that Treaty. These efforts have not proved successful.

(4) Statistics of the peace-time armaments and of the yearly expenditure of states are published by the League, and although incomplete, furnish a basis for the student of armaments in Europe.

(5) The right of investigation considered by the Permanent Advisory Commission, has not yet been utilized.

(6) It has not been possible to prevent destructive inventions for chemical warfare or to draw up any rules regarding their use.

The contributing factors to this period of effort in which practical results have been so long delayed may be summarized as follows: (1) The inherent difficulty in devising any scheme of disarmament which states will accept in the absence of any other equally effective guarantee of defense; (2) the different interests of the states, some being disarmed, others not being armed up to the point of national safety, others being over-armed; (3) the different status of the states with regard to security, some being relatively safe while others are insecure; (4) reluctance of states to furnish information which will weaken their defenses; (5) trend toward military alliances which pool armaments in localities or against special states as against a general scheme of reduction; (6) the necessity that a plan be universal to succeed and the refusal of non-member states to accept the League scheme; (7) differences of opinion among the Allied Powers as to mutual assistance which France holds to be indispensable to a reduction of armament; (8) conflict in the League between the military and civilian elements which prevents practical plans being made by either; (9) over-organization of the academic aspects of the subject, with a corresponding loss in the practical aspects of the question. But the insuperable difficulty is the desire of the League Council to control the scheme for disarmament, a plan rejected by non-member states, and without whose co-operation no general plan can succeed.

It is therefore apparent that no security has been afforded by any general scheme of disarmament in relation to the menace to peace—namely, territorial, racial, economic and political insecurity.

The responsibility for this failure lies in the inescapable logic of the situation, that so long as war is the recognized method of settling disputes, and in the absence of any security against aggression, nations will rely upon armaments and the work of committees which deal with results, not causes, therefore must remain futile.

CHAPTER XXXVII

TREATY OF MUTUAL ASSISTANCE

The endeavors of the Temporary Mixed Commission have not, however, been without concrete results, for it has prepared a Treaty of Mutual Assistance, based upon Resolution XIV which was adopted by the Third Assembly.[1] The submission of this Treaty was approved by the Assembly, after its final revision by the Third Committee in September, 1923.[2] Replies have been received from the various governments and it will again be the subject of discussion, if not revision, during the sessions of the Fifth Assembly in September, 1924. The following discussion contains an analysis of the proposal, as approved by the Fourth Assembly:[3]

OBJECT OF THE TREATY

The Preamble sets forth the object of the Treaty in the following terms:

> "The High Contracting Parties, being desirous of establishing the general lines of a scheme of mutual assistance with a view to facilitate the application of Articles X and XVI of the Covenant of the League of Nations, and of a reduction or limitation of national armaments in accordance with Article VIII of the Covenant 'to the lowest point consistent with national safety and the enforcement by common action of international obligations,' agree to the following provisions."

It will be observed that the primary object of the Treaty, as stated in the Preamble, is to strengthen the Covenant by facilitating the application of Article 8, relating to the reduction of armaments, Article 10, prohibiting aggression; and Article 16, relating to sanctions. It presents the theory that disarmament is the single greatest step toward the maintenance of peace; in order to facilitate disarmament there must prevail a sense of security; and that the best way to bring this about is through providing mutual military assistance. This scheme does not differ materially from the Covenant which it amplifies; but it is not to be regarded as either an interpretation or an amendment of the Covenant. Nor is the Treaty declared to be supplemental to that

[1] For text of Resolutions see p. 699.

[2] The full discussion of this Treaty will be found in the *Records of the Fourth Assembly, Minutes of the Third Committee.* All references, unless otherwise noted, are to this document.

[3] Annex VI for text of the Treaty.

instrument. What is here undertaken is the creation of a parallel system of mutual assistance, not limited to Members of the League, although the articles it seeks to apply are part of the Covenant. In this respect the Treaty is not self-sufficient; although it is not quite apparent in what manner non-members of the League may endorse it without becoming involved in the Covenant which it amplifies.

This Preamble, however, raises the question whether this Treaty is intended to modify the terms of the Covenant for such Members of the League as may become signatories. It refers, for instance, to a reduction or *limitation* of armaments, whereas the Covenant contemplates only a reduction. The essential difference is that a limitation may refer only to the future, leaving existing armaments as they are; whereas a reduction permits of but one interpretation.

AGGRESSIVE WAR A CRIME

Article I of the Treaty, however, contains a departure from the terms of the Covenant, wherein it declares aggressive war to be an international crime. As a declaration of principle in the direction of law and from militarism the proposal constituted an advance in thought. But its inclusion in a document which subsequently authorizes warfare as the means of preserving peace and which converts the Council into a military dictator must cause some misgivings as to the interpretation its drafters place upon the declaration. A reference to the article confirms the doubt:

> "The High Contracting Parties solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission.
>
> "A war shall not be considered as a war of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice, or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party."

It will be observed that the so-called international crime is without definition and the act violates no law against war. The Committee of Jurists, appointed by the Third Committee in September, 1923, suggested that paragraph 1 contain the words a "war entered into contrary to the provisions of the Covenant" as a remedy for this defect. The inclusion of that proposal would have made the Covenant the fundamental law to guide the Council or the Court. The Third Committee rejected the proposal; and the Council is to have only its own will to

consider. International law recognizes aggressive warfare as legal; international agreements contain regulations for the conduct of war; and the Covenant authorizes acts of war. By a simple phrase, the Treaty would run counter to existing law and fact, while providing no legal foundation of its own for the determination of a war of aggression.

Subsequent phraseology but strengthens the indefiniteness of this proposal. The Covenant, in Article 10, refers to "external aggression," and the threat or danger of such aggression, while Article 11 refers to a "war or threat of war," and Article 12 refers to "ruptures." These phrases leave less to the imagination than do those used in the Treaty which include "apprehend an outbreak of hostilities;" and "aggressive policy and preparations."[4] It will be observed that the Council is hereby enabled to deal with states of mind of nations under apprehension, and it may examine into the foreign policies and general *preparations* of states—an authority not contemplated under the Covenant.

Notwithstanding there is no law to transgress by a state engaging in aggressive warfare, the second paragraph of Article I provides that whenever a state does not accept the unanimous recommendation of the Council, the verdict of the Court, or an arbitral award, other states may proceed to make war against it, such not being a crime; provided only that they do not *intend* to violate the political independence and territorial integrity of that party. It will be noted that the Council may make a unanimous recommendation without being bound by the terms of the Covenant, and that this recommendation is the equivalent of the verdict by a Court; both authorizing a state to make war upon another state which does not accept such recommendation or verdict. According to what principles of law a recommendation or verdict is to be made remains indefinite, depending wholly upon the political discretion of the Council or the judicial discretion of the Court.

There is a further ambiguity in the paragraph in that the *intent* to aggress territory and the *fact* of aggression are apparently separated—a liberty not permitted under Article 10, which treats all acts of external aggression as evidence of intent to aggress. To this extent, the Treaty may be regarded as weakening the provisions of the Covenant while creating no substantial legal ground on which aggressive war can be adjudged a crime.[5]

[4] Originally this phrase read aggressive policy and military preparations, but the word *military* was deleted by the French representative, to give the article broader scope.

[5] In the United States this declaration has been interpreted by certain peace advocates to mean the "outlawry of war." The principle adopted by the League

WARS OF AGGRESSION

If aggressive warfare is to be prohibited, or permissible only after a state has submitted its dispute to the Council for a recommendation or to the Court for a verdict, as the preceding article implies, it becomes of importance to determine in what manner the matter may be submitted by the parties concerned. Paragraph 1 of Article 3 of the Treaty provides as follows:

"In the event of one of the High Contracting Parties being of opinion that the armaments of any other High Contracting Party are in excess of the limits fixed for the latter High Contracting Party under the provisions of the present Treaty, or in the event of it having cause to apprehend an outbreak of hostilities, either on account of the aggressive policy or preparations of any State, party or not to the present Treaty, it may inform the Secretary-General of the League of Nations that it is threatened with aggression, and the Secretary-General shall forthwith summon the Council."

It will be observed that the vagueness of Article 1 is somewhat broadened by the introduction in Article 3 of the "opinion" of the High Contracting Parties, and by the use of the word "excess" of armaments without indication whether such excess shall be technical or material; also the term "aggressive policy and preparations" is left indefinite. Notwithstanding, any state signatory to the Treaty may bring a complaint upon such opinion of excess of armaments or upon apprehension concerning the policy or preparations of a state, before the Council. Such complaint may be brought not only against signatories to the Treaty, but members of the League and non-member states may also be denounced.[6] It will be noted that no provision is made by which the matter can be brought before the Court for judicial review, but denounced states are entitled to be brought only before a political tribunal. This omission does not appear to carry out the intent expressed in Article 1.

agrees with the American principle, as set forth by its advocates, in that defensive warfare is permitted to the state attacked. League and American principles differ, however, in that Articles 10 and 16 which the draft treaty is intended to facilitate authorize a general warfare to be undertaken by all members upon the state committing an aggression. This, in effect, legalizes and authorizes warfare by all countries against the aggressor, a principle not accepted by the exponents of the American proposal. Instead of outlawing war, the League proposal would require states without grievances and without intimate knowledge of the circumstances, to proceed to war. A further differentiation appears to exist in that the American plan does not favor the use of force as a sanction, while the Treaty prescribes it.

[6] In the earlier drafts of the Treaty, the original of "denounced" was "accused."

THE POWERS OF THE COUNCIL

In the event that a state brings a complaint before the Council, that body is invested with the following powers under the second paragraph of Article 3:

"The Council, if it is of opinion that there is reasonable ground for thinking that a menace of aggression has arisen, may take all necessary measures to remove such menace, and in particular, if the Council thinks right, those indicated in sub-paragraphs (a), (b), (c), (d) and (e) of the second paragraph of Article 5 of the present Treaty."

It will be noted when the Council is of the opinion that reasonable ground for thinking that a menace of aggression has arisen, it may proceed to remove such menace. There is no indication in this paragraph that there need be a basis of fact, nor in what manner a menace of aggression shall be recognized as such. This is a question to which the Permanent Advisory Commission, to which it was submitted for examination, gave considerable thought and while proposing that the Council be given complete discretion, it suggested the following methods of determining types of aggression:[7]

"1. Organization on paper of industrial mobilization.
"2. Actual organization of industrial mobilization.
"3. Collection of stocks of raw materials.
"4. Setting on foot of war industries.
"5. Preparation for military mobilization.
"6. Actual military mobilization.
"7. Hostilities."

The Sub-committee of the Temporary Mixed Commission pointed out that 1 and 5 were difficult to recognize and "represent precautions which every government is entitled to take"; that No. 3 may be justified by economic reasons such as "profiting by advantageous markets or collecting stocks in order to guard against the possible closing of certain channels of supply owing to strikes"; that No. 4 was the first which might be definitely taken as an intention to commit aggression and was easily concealed; and when 6 and 7 had taken place it was too late to prevent war. The Committee suggested that, in the absence of any indisputable tests, governments would have to judge by impressions such as the political attitude of the probable aggressor, its propaganda, attitude of press and population, and policy on the international market. The Committee therefore concluded that the Council should be given "complete discretion," and merely

[7] *Records of the Fourth Assembly,* Minutes of the Third Committee; p. 117.

indicated the factors which may provide the elements of a just decision, as follows:[8]

"(a) Actual industrial and economic mobilization carried out by a State either in its own territory or by persons or societies on foreign territory.

"(b) Secret military mobilization by the formation and employment of irregular troops or by a declaration of a state of danger of war which would serve as a pretext for commencing hostilities.

"(c) Air, chemical or naval attacks carried out by one party against another.

"(d) The presence of the armed forces of one party in the territory of another.

"(e) Refusal of either of the parties to withdraw their armed forces behind a line or lines indicated by the Council.

"(f) A definitely aggressive policy by one of the parties towards the other, and the consequent refusal of that party to submit the subject in dispute to the recommendation of the Council or to the decision of the Permanent Court of International Justice and to accept the recommendation or decision when given."

As a consequence, Article 3 is so drawn as to permit the Council complete discretion in the use of any or all of these elements or to reject them and devise new tests of which it alone is to be the judge.[9] It may also be pointed out that under present conditions the violation of frontiers may not constitute actual aggression as political and military frontiers do not necessarily coincide (as, for instance, at Vilna); that the use of armed forces is not definite as states now resort to police and irregulars (whom they may disavow, as at Memel and Fiume); that the crossing of a frontier by the forces of a small state may in reality be a strategic movement of defense against a powerful anticipated enemy; and that aeroplane manoeuvers in the clouds defy the specifications of frontier lines. Therefore, the question of what tests are to guide the Council in branding a state an aggressor, guilty of the crime of war, is of paramount importance.

In the event that the parties engage in hostilities, the Council is authorized to proceed as follows under par. 1 of Article 4:

"In the event of one or more of the High Contracting Parties becoming engaged in hostilities, the Council of the League of Nations shall decide, within four days of notification being addressed to the Secretary-General, which

[8] *Records of the Fourth Assembly*, Text of Debates; p. 408.

[9] Article 15 apparently does not modify this statement for while the Contracting Parties recognize as *ipso facto* obligatory the jurisdiction of the Court with regard to the interpretation of the Treaty, the Council has assumed no obligation to refer any matter to the Court. This is quite an important oversight as many of the differences of opinion will arise over the interpretation of the Treaty by the Council.

of the High Contracting Parties are the objects of aggression and whether they are entitled to claim the assistance provided under the Treaty.

"The High Contracting Parties undertake that they will accept such a decision by the Council of the League of Nations."

It will be observed that the Council is here given authority to make a *decision* whereas in Article 15 of the Covenant it may only *recommend*. In effect, this provision deprives signatory states of all right to an opinion upon the question of the guilt of an accused state. That such signatory states agree further to accept this decision in advance constitutes a relinquishment of their right to have any voice in determining an issue which may call them into war. These provisions constitute a complete reversal of the terms of the Covenant which reserves to the state the sovereign right to determine the merits of a controversy which may engage it in war. While it is appreciated that a time limit is desirable in considering acts or threats of aggression, the four-day rule appears to be too rigid. In this age of air and chemical warfare four days is too long a time for making plans for rendering effective assistance to the aggressed state, and it is too short a time to determine the justice of most disputes, involving as they do political questions of broad scope and moment. In the absence of any penalties for non-observance, the four-day clause may well afford no timely relief.

Nevertheless, in this hasty review, the Council may reach a unanimous decision recognizing one or more states as either planning aggression or as being aggressors. In either case, the Council may proceed to remove the menace in the following manner, as provided in Article 5:

"The High Contracting Parties undertake to furnish one another mutually with assistance in the case referred to in Article 2 of the Treaty in the form determined by the Council of the League of Nations as the most effective, and to take all appropriate measures without delay in the order of urgency demanded by the circumstances.

"In particular, the Council may:

"(a) Decide to apply immediately to the aggressor State the economic sanctions contemplated by Article XVI of the Covenant, the Members of the League not signatory to the present Treaty not being, however, bound by this decision, except in the case where the State attacked is entitled to avail itself of the Articles of the Covenant;

"(b) Invoke by name the High Contracting Parties whose assistance it requires. No High Contracting Party situated in a continent other than that in which operations will take place shall, in principle, be required to co-operate in military, naval or air operations;

"(c) Determine the forces which each State furnishing assistance shall place at its disposal;

"(d) Prescribe all necessary measures for securing priority for the communications and transport connected with the operations;

"(e) Prepare a plan for financial co-operation among the High Contracting Parties with a view to providing for the State attacked and for the States furnishing assistance the funds which they require for the operations;

"(f) Appoint the Higher Command and establish the object and the nature of his duty."

Under these provisions, it will be observed that no state would have any certainty as to the number or nature of the conflicts in which it might become involved; it would, if it were an assisting state, have no knowledge of the extent or nature of the assistance it would be called upon to render, nor to what states. It would not know the nature and extent of its economic commitments which might disorganize its commercial interests; nor of its financial assistance which might prove to be an unforeseen burden upon its people; nor of its military assistance which might imperil its home defenses. If it were a state requiring assistance, the amount of assistance to be received would be equally indefinite, depending as it must upon the good will of the states; the approval of their parliaments; and the willingness of the people to send their sons and furnish resources to fight on behalf of a vague international solidarity in countries with which geographically, racially and culturally they might not be in sympathy. While awaiting the operation of these political and human elements, the state attacked would be unable to prepare plans for the despatch of its forces; nor would it know when, where nor how the assistance would be made available.

The uncertainty of the assistance which the Council could command under these provisions is increased by Article 17 which states that "any state may, with the consent of the Council of the League, notify its conditional or partial adherence to the provisions of the Treaty, provided always that such state has reduced or is prepared to reduce its armaments in conformity with the provisions of this Treaty." This article permits the inference that a signatory state may, upon signing the Treaty or at any time thereafter, notify its "conditional or partial adherence."

Members of the Third Committee, when discussing this article, were in doubt as to its meaning. Might certain states adhere on condition that their assistance was only moral, or merely military, or confined to naval or air equipment? Might other states furnish only financial help? Might others co-operate only through economic

measures? Under these possible conditions what would be the rights of adhering states against those having reservations? This raised the further question of whether Article 17 was not equivalent to a subtraction from the Covenant and could states, members of the League, resort to it in evasion of the Covenant by becoming signatories with reservations to the Treaty?[10] Without answering these important questions to the satisfaction of its members, the Third Committee approved the draft.

Apparently no provision has been made for assisting a state in the event that the Council fails to reach a unanimous decision. The Covenant provides in Article 15 for a majority report which shall make public the recommendations of the Council. When the Council fails to reach a report unanimously the states are then free to take such action as they consider necessary. But under the Treaty, a state threatened with aggression is granted no such right, and may be charged with the crime of aggressive warfare if it proceeds without awaiting an award. No provision is made for its release nor for any publicity under such circumstances. This appears to be a limitation upon the rights of a state as a member of the League under the Covenant. Furthermore, whenever Council members have special treaties under which they become interested parties in the issue before the Council, they are not entitled to vote. It may, therefore, happen that the Council will take a decision by a minority, representing the less important states. This might result in a decision which the parties would feel justified in considering as incompetent or unauthoritative. That such a circumstance might arise, may be seen from the fact that France, Italy, Belgium, Czechoslovakia and Spain, members of the Council, have agreements which might be construed as a bar to their voting whenever the other parties to these treaties or their interests were involved. The fact that the other remaining members of the Council may decide in favor of their voting is in itself a traducing of the legal principle that a party shall not be the judge in its own cause, namely, whether it shall enter into a general war of assistance or fulfill its special obligations. In the event of a conflict between the two obligations, the decision becomes important to that state.

The powers of the Council, as stated in Article 5, possess certain

[10] For discussion of this point see *Revue de Droit Internationale*, 1924, Nos. 1-2; pp. 1-12; "Les Rapports entre le Pacte de la Société des Nations et le Projet de Traité d'Assistance Mutuelle," by M. Erich, Professor at the University of Helsingfors.

characteristics which might precipitate debate, when effective and prompt assistance of an aggressed state was the immediate problem. For instance, paragraph (a) provides that the Council may decide to apply the economic sanctions contemplated in Article 16. In that article, the exercise of the economic sanctions can only be taken upon the initiative of the states and not by the Council. Again, the Treaty provides that states, not signatory to the Treaty, but members of the League will be bound by this decision, provided the state attacked is entitled to avail itself of the provisions of the Covenant which would be the case if the state were also a member of the League. A member state of the League, not signatory to the Treaty, would certainly question the legality of any proceedings when called upon for economic assistance under the Treaty in direct opposition to its right to initiate or refuse this assistance under the Covenant.

Paragraph (b) provides that the Council may select the states to give assistance and that signatory states located on continents other than that on which the operations are to take place shall not be required to co-operate. Upon what basis will the selection take place and are there to be no rules to guide the Council, which rules states are entitled to know in advance? In the event that Persia is an aggressed state, may no European Power be called upon to assist it, although under Article 10 of the Covenant, it is entitled to assistance from all members of the League? Are neighboring states to bear the burden on the principle of proximity; are neutral states to contribute a disproportionate share on the principle that they are in no danger at home or have not suffered impairment of resources in men and arms? But whatever principle of selection is followed, the basis of equality and reciprocity established by Article 10 of the Covenant is destroyed; and granting to the Council the right of selection, without indication as to the basis of its choice, appears to confer upon it powers in excess of and contrary to the Covenant.

Paragraphs (c) to (f) constitute the Council a military dictator. It, not the states, may determine the forces which each state shall send; it shall be granted priority over communications and transport; it plans the budget for the campaign; and it appoints a Higher Command.[11]

The final paragraph of Article 5 provides that representatives of states, recognized by the Council as aggressors, may not take part in

[11] The earlier drafts provided for a commander in chief; but it was thought that the military, naval and air divisions might each require commanders and the Higher Command was adopted as permitting a military staff.

the deliberations wherein the plans for assistance are made; but that states requested to assist may do so. It does not appear that these representatives are other than consultants or that they have any vote or veto power over the proposals which involve the forces of their states.

THE HIGH CONTRACTING PARTIES

Such being the powers of the Council, what are the rights and obligations of the states which become signatories? The various steps in the exercise of rights by a state are the following: (1) When a state apprehends aggression or observes preparations for the menace of aggression or thinks a state is arming against it, the Secretary-General may be notified. (2) He shall call a meeting of the Council. (3) The Council then invites representatives of the interested parties and decides which is the aggressor and which is entitled to assistance. (4) If the state recognized as the aggressor persists in its preparations, the other state is free to begin war. (5) If the states are already engaged in hostilities, the Council decides which is the aggressor. (6) If the aggressor does not make peace, or accept the award, the Council will then formulate plans of assistance. (7) It will select the states to assist, invite their representatives and make out its campaign which may be either economic or military. (8) It will appoint a Higher Command to take charge of the direction of the assistance it requisitions. (9) When the aggressor state is defeated the Council will assess the costs, and collect and distribute the reparations.[12] The Higher Command of the Council will be the directive force in the whole proceeding and is in essence a military command. Among the benefits to states may be noted the right to accept a limited obligation to furnish assistance under the Treaty to aggressed states; and a reduction of armaments and taxation, provided a state is sufficiently assured as to the forthcoming assistance.

A comparison of the foregoing procedure under the Treaty with that of the Covenant indicates that the actual additional benefits which a state may receive are the recovery of costs and reparations; a limited obligation under Article 17 of the Treaty in place of a

[12] The Treaty apparently makes no provision for the contingency that a state adjudged the aggressor may attract to itself sufficient aid under special treaties or otherwise to offset the general aid and defeat the forces of the Council's Higher Command. The fact that victors are not accustomed to pay reparations suggests the necessity of including some ameliorative clause which, under such circumstances, would relieve the Council from the burdens imposed under this Article and make it less liable to the states for successful execution of these provisions.

general obligation under Article 10 of the Covenant; and an incentive to reduce armaments in exchange for security.

States also have certain rights during the procedure for determining aggression and for making preparations for assistance. The High Contracting Parties which have been denounced and those which have stated themselves to be the object of aggression are to be considered as specially interested and may send representatives to the Council. When hostilities are actually begun, the parties so engaged may send representatives but the vote of an interested party is not reckoned in unanimity. This rule applies also to states having special agreements which involve them on behalf of the belligerents. The remaining members of the Council may, however, decide otherwise. It does not appear indisputably from the text of the Treaty whether in the event that a member of the Council is a party to the dispute, it is entitled to vote.

A state recognized as an aggressor may not take part in the deliberations concerning the measures to be taken against it whereas those invited to furnish assistance shall be invited to send representatives. The weight to be attached to their presence, however, in arranging the campaign of assistance is nowhere set forth.

In order to obtain these rights and benefits, signatory states relinquish certain other rights and undertake certain obligations, not incurred as members of the League under the Covenant. As to sovereignty, they relinquish their right to determine when there is a menace of war or of aggression; they abdicate their right to receive, accept or reject a recommendation of the Council, in favor of a decision which they agree to accept in advance; they assign the control of their armaments and their requisitioning to the Council to be disposed of as it sees fit; and the control over their transport and communications in time of war, which is a serious matter to neutral states.[13]

A Member of the League is now entitled to assistance from all other Members in the event of aggression. In lieu of this guarantee, Members who become signatories to the Treaty are entitled to receive military assistance only from Members on the same continent; under such reservations as they may make. In view of this fact, under which instrument, the Covenant or the Treaty, will the Council take action when one party resorts to the Covenant and the other to the

[13] Switzerland is reported to have declined to approve of the Treaty of Mutual Assistance on the ground that it is a military pact and violates its principles of established neutrality.

Treaty? And in no event is the assistance available unless the state claiming it has reduced its armaments. The determination of the fact whether a state has made a sufficient reduction to warrant its receiving assistance is a function of the Council.

A state, signatory to the Treaty, also incurs certain liabilities, which do not appear to exist under the Covenant. It runs the risk of being declared an aggressor state and thus guilty of the crime of aggressive warfare; and of being adjudged such by a political tribunal upon no known principles of law, by no established procedure, and according to no discernible rules of evidence. This is no small risk, for with that adverse decision would probably go the moral condemnation of the world. (2) A state so condemned is offered no promise of reinstatement. The statute is silent concerning the time or manner in which it shall be deemed to have complied with the award or the conditions upon which its denouncement may be cancelled. In view of the fact that there is no appeal from the decision of the Council, this omission is indeed serious.[14] (3) A state so adjudged is to be subjected to the combined attack of states which may differ from the decision of the Council and which may think the denounced state to be in the right; nevertheless, they must make war upon it even when it is contrary to their own belief. This circumstance loses sight of a fundamental principle that no democratic nation will take decisions to go to war unless it is supported by the weight of public opinion which embodies the interests and sympathy of its people. An opinion as to war guilt rendered in Geneva against states friendly to a nation does not necessarily contain the foundations of such public opinion. (4) A state thus denounced incurs the liability of paying the entire costs of the war and reparations, for Article 10 provides as follows:[15]

[14] The Versailles Treaty was less negligent in this matter than the Treaty of Mutual Assistance. Arts. 415 and 416 provide for a reference to the Court of certain labor disputes. Art. 417 provides that the Court may indicate the economic measures which it considers appropriate for states to apply to a defaulting state. Art. 420 provides a process for the *reinstatement* of a defaulting state when it has complied with the decision of the Court, including a Commission of Inquiry and certification to the Court. In labor disputes this precaution is taken; but in the grave matter of war, no such provision is deemed necessary in a proceeding before the Council.

[15] The Committee of Jurists to which the draft treaty was submitted for examination proposed the following wording, together with two observations:

> "The High Contracting Parties are of opinion, in accordance with the spirit of this Treaty, that the whole cost of any military, naval or air operations which are undertaken for the repression of an aggression under the terms of the present Treaty, and also the reparation of all material damage caused by

"The High Contracting Parties agree that the whole cost of any military, naval or air operations which are undertaken under the terms of the present Treaty and of the supplementary partial agreements, including the reparation of all material damage caused by operations of war, shall be borne by the aggressor State up to the extreme limits of its financial capacity.

"The amount payable under this Article by the aggressor shall, to such an extent as may be determined by the Council of the League, be a first charge on the whole of the assets and revenues of the State. Any repayment by that State in respect of the principal money and interest of any loan, internal or external, issued by it directly or indirectly during the war shall be suspended until the amount due for cost and reparations is discharged in full."

The fact that the proposed costs are to constitute a first charge on the whole of the assets and revenues of a state; that the Council shall determine the amount without specifications as to the kind of charges which are to be included or as to methods of assessment, or as to the meaning of "material damage" constitutes a liability of so grave and uncertain a nature as to preclude its acceptance in its present form.

THEORY AND PRACTICE

In practice, however, this scheme does not take into consideration sufficiently a number of practical difficulties. (1) Ten Members of the Council will have difficulty in reaching a unanimous vote (a) in naming an aggressor state; (b) in determining what constitutes a menace of aggression and "preparations"; (c) in naming a Higher Command to take charge of the military forces which states contribute and are accustomed to command; and (d) upon the selection of states to render assistance. (2) The government or people of signatory states may differ in opinion from the decision of the Council and although bound to furnish assistance will find difficulty in the delivery of its aid to an unpopular cause or to one suspected of being guided

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the operations and of all injuries suffered by civilians or members of the military forces, should be borne by the aggressor State up to the extreme limits of its financial capacity."

"1. The Committee of Jurists is of opinion that the High Contracting Parties cannot assume an engagement on this subject, for there is a possibility that the war claims might conflict as to priority with the claims of other states.

"The Council must be trusted to satisfy in the greatest possible degree the principles laid down in the first paragraph.

"2. The Committee of Jurists thinks that the Third Committee intended that mention should be made of injuries to individuals, who appeared to be excluded by the restrictive nature of the proposed wording." *(Records of the Fourth Assembly,* Minutes of the Third Committee; p. 194.)

by ulterior motives. (3) The selection of states to send men and equipment into a war with which a state has no immediate racial, economic, geographic or other affiliation may raise questions concerning the basis of selection. Parliaments, it may be assumed, will not readily accept a draft without rigid inquiry into the reasons for not selecting other states to share the burden. (4) The success of a plan of assistance depends upon the immediacy of its action which presupposes that the Council has in hand for each state information as to its general staff, the forces it can put into the field, its requirements from other states and plans for the direction of this mobilization; and that the Council, having decided how far these requests are reasonable, will then have no difficulty in securing from states the necessary troops and equipment, and despatching them to the spot. (5) The scheme is based upon two fundamental conceptions (a) that in the last analysis the right and power to make war through pooling military resources is the basis of security; and (b) that there exists among states that sense of international co-operation which makes such a pooling of military strength possible. There is little in the nature of the disputes settled during the past five years to support either of these beliefs. The Allied Powers have not been able to pool their military resources to protect their own interests under the Covenant; and mutual distrust extends in many directions which now prevent concerted and stable plans for co-operation. With a public opinion moving against the use of force and toward the abolition of war, the conscription of men in neutral and small states to fight battles in far away lands on behalf of a cause unknown or unpopular among the people is to presuppose a high degree of international co-operation. (6) The fear of small and neutral states, not engaged in the Great War, that they may have to bear a disproportionally heavy burden in the requisitions for assistance may create obstructions to the fulfillment of the scheme. Is it not possible under a scheme which does not in advance proportion the assistance to be furnished to the fighting strength and resources of each state upon some definite scale, but leaves the choice and assessment to the Council, that small and neutral states will be called upon to bear a heavy burden; or that neighboring states of the belligerents will be unduly taxed; or that states whose forces were not engaged in the war will be called upon first? Lastly, the scheme overlooks the sympathy which is given to a delinquent state by other states which consider the future and that they may be placed in a similar position and in need of friends.

These are some of the practical difficulties to be met in the application of the theory of the Treaty of Mutual Assistance, which among others have thus far rendered Articles 10 and 16 of the Covenant unavailable to aggressed states.

COMPLEMENTARY AGREEMENTS

These practical difficulties are so evident that the Temporary Mixed Commission sought to minimize them by providing for special agreements among the states.[16] To this end, the Treaty contains the following articles:

"Article 6. For the purpose of rendering the general assistance mentioned in Articles 2, 3 and 5 immediately effective, the High Contracting Parties may conclude, either as between two of them or as between a larger number, agreements complementary to the present Treaty exclusively for the purpose of their mutual defence and intended solely to facilitate the carrying out of the measures prescribed in this Treaty, determining in advance the assistance which they would give to each other in the event of any act of aggression.

"Such agreement may, if the High Contracting Parties interested so desire, be negotiated and concluded under the auspices of the League of Nations.

"Article 7. Complementary agreements, as defined in Article 6, shall, before being registered, be examined by the Council with a view to deciding whether they are in accordance with the principles of the Treaty and of the Covenant.

"In particular, the Council shall consider if the cases of aggression contemplated in these agreements come within the scope of Article 2 and are of a nature to give rise to an obligation to give assistance on the part of the other High Contracting Parties. The Council may, if necessary, suggest changes in the texts of agreements submitted to it.

"When recognized, the agreements shall be registered in conformity with Article XVIII of the Covenant. They shall be regarded as complementary to the present Treaty, and shall in no way limit the general obligations of the High Contracting Parties nor the sanctions contemplated against the aggressor State under the terms of this Treaty.

"They will be open to any other High Contracting Party with the consent of the signatory States.

"Article 8. The States parties to complementary agreements may undertake in any such agreements to put into immediate execution, in the cases of aggression contemplated in them, the plan of assistance agreed upon. In this case they shall inform the Council of the League of Nations, without delay, concerning the measures which they have taken to ensure the execution of such agreements.

[16] The basis for these agreements was laid in a resolution passed by the Assembly in 1921 and arose from the fact that France had concluded such agreements without registering the technical chapters providing for the *modus operandi* of the clauses of assistance. See Chap. I; p. 33. Other states have since followed the lead of France in concluding such treaties; see Chap. XXXVI; p. 713.

"Subject to the terms of the previous paragraph, the provisions of Articles 4 and 5 above shall also come into force both in the cases contemplated in the complementary agreements and in such other cases as are provided for in Article 2 but are not covered by the agreements."

It will be noted that Article 6 authorizes the negotiation of such treaties which may be conducted under the auspices of the League of Nations.[17] Article 7 grants to the Council authority to examine and decide whether they are in accordance with the Treaty or Covenant and it may suggest changes with a view to such conformity. When recognized by the Council they shall be registered and will be regarded as complementary to the present Treaty. They will be open to other states signatory to the Treaty only with the consent of the signatory states.

In relation to the Covenant the provisions of these two Articles possess certain points of interest: (1) Article 20 of the Covenant provides that members of the League will enter into no engagements or obligations inconsistent with the Covenant. The state is apparently the judge of such inconsistency. In the Treaty, this right of judgment is transferred to the Council with respect to this particular form of agreement. (2) These agreements may constitute regional understandings within the meaning of Article 21 of the Covenant and are therefore exempt from the provisions of the Covenant. If so, under the Covenant it is the states which determine that exemption; while under the Treaty the Council would appear to acquire the right. (3) Under Article 18 of the Covenant, treaties are required to be registered and, as soon as possible, published. The Treaty provides for registration but not for publicity. (4) Although the questions which will arise as between the Covenant and Treaty are essentially legal, the Council has regarded them as primarily political and has reserved to itself jurisdiction over the determination of such consistency. (5) No provision seems to have been made for the recognition of a complementary agreement made between signatory and non-signatory states. The exact position is therefore uncertain in which Members of the League, one signatory and the other not, would find themselves in the event of war. (6) These special treaties are open to other states only with the consent of the signatories, a principle of limited membership not set forth in the Covenant and hitherto opposed as constituting blocs within the family of nations.[18]

[17] This is one of two references in the Treaty to the "League," the other being the registration of adherences and withdrawals with the Secretary-General. In other instances it is the Council alone which is authorized to act.

[18] See p. 711.

In order to meet the delays which it was anticipated would arise under the application of the General Treaty, the plans of assistance contained in these complementary agreements may be put immediately into operation whenever the parties so determine, without waiting for the Council to decide which state is the aggressor. In the event that the Council should decide in favor of the state upon which the signatories to the complementary agreement have begun war, no provision seems to have been made for the cessation of hostilities, nor for the transfer of their assistance under the General Treaty to the party against whom they have concluded a special agreement.

This lack of precision raises squarely the question: In a possible conflict of opinion between states which have entered into a complementary agreement against a state, and the Council undertaking to apply the General Treaty on behalf of that state, which undertaking will take precedence? Article 7 states that these agreements shall in no way limit the general obligations of the High Contracting Parties nor the sanctions contemplated. But the practical situation confronting the Council would not be one of theory, it would consist of its being able to convince a state against its own interest that it should attack a state with which it has a defensive agreement.

On this point M. Benes (Czechoslovakia) expressed the view of himself and his colleagues that "the Covenant was supreme and all partial treaties should be subordinated to it in both letter and spirit. In these circumstances when such treaties came into action automatically, all nations of the world would be obliged to abide by the decision of the Council in accordance with the principles of the Covenant." [19]

This view, however, does not dispose of the necessity of first determining the question of conflict between Covenant and Treaty which states will be disposed to argue before the Council when they should be furnishing assistance. Czechoslovakia and Poland spent nearly four years in legal argument over a point less obscure in the matter of Jaworzina; and Poland contested with the Council the minorities question for nearly two years under the most explicit provisions. There is little in the record of states engaged in controversies to indicate any such willingness to accept the decisions of the Council; on the contrary, according to precedents, they may be expected to resort to legal excuses to avoid being brought into warfare against their own interests.[20]

[19] *Records of the Fourth Assembly,* Minutes of the Third Committee; p. 46.
[20] For hypothetical cases, see Annex VII.

THE CONTROVERSY OVER SPECIAL TREATIES

The question of admitting special treaties for military defense within the General Treaty and of authorizing member states to create blocs and alliances has divided the states of the League into two groups. The arguments advanced by each group may be summarized as follows: Those in favor of the General Treaty are opposed to complementary treaties for the following important reasons: (1) The encouragement of defensive alliances will stimulate counter alliances and this will lead to the system of balances of power maintained by these combinations, not unlike those existing before the recent war. (2) Such alliances will diminish the importance of the General Treaty and may weaken or destroy the League by causing dissentions within its ranks. (3) Special treaties which are usually directed against specific states will not lead to a reduction of armaments for the very creation of such treaties is evidence of suspicion and distrust.[21] (4) In theory, the Council will control the special treaties; in reality, they will control the Council. (5) No provision is made for the cessation of hostilities when states are given the right automatically to begin warfare. (6) Such treaties rely too much upon material force and not sufficiently upon moral force. (7) If a large number of states adhere to the General Treaty, an aggressor state will know that all states will be against it, but if some have special treaties, it will hope that some states, not having such treaties, will not render assistance against it. (8) The greater the number of states in one treaty, undivided by special treaties, the greater the confidence. (9) Under the General Treaty, special obligations can be imposed upon neighboring states if they are not bound by the terms of special treaties. (10) Under special treaties a few states will be prepared to act and will increase armaments which will give them an ascendancy in League affairs. (11) The special treaty is a double-edged instrument; it may temporarily check aggression by the state against which it is directed, but at the same time stimulate that state to form alliances with which to oppose the first alliance. (12) It will be difficult

[21] It has been pointed out that a state might reduce armaments and yet by a combination become a more formidable military power; and that by placing the combination under the control of one state, that state would achieve a military dominance wholly disproportionate to its own military strength. Therefore, while the relative strength of states might be less, the combination of states under such leadership might constitute them a greater military menace. The line of demarcation between forces combined for defensive purposes and their use for offensive purposes being so slight might constrain other states to erect military barriers against the possible misconception as to what constitutes defensive and what offensive military tactics.

to localize a dispute because of the immediate operation of special treaties, which precipitate the states concerned into a state of war.

The arguments of the members of the League in favor of special treaties may be summarized as follows: (1) A General Treaty will be effective only when it is too late; it will enable a state to count on a final victory but will not save it from invasions and consequences of war. (2) It is impossible to draw up *general guarantees* in advance; they can only be organized after a threat of war and invariably will be attended by delay. (3) As between two or more states, a prearranged plan can be made concerning a general staff, expeditionary forces, transport, supplies and concentration, and economic and financial mobilization which can automatically be put into operation immediately. (4) If there are many signatory states, there will be a marked difference in national interests and in willingness to undertake burdens and make sacrifices, unless there is a common interest; —in which case their assistance would be highly problematical; and states will not give up their armaments for so uncertain an assistance. (5) No suitable procedure can be devised to bring the General Treaty into play immediately, when the Council must first define various kinds of aggression. (6) Provision cannot be made for supervision to insure that states have not exceeded their armaments and that they are maintaining only those necessary for defense; on the other hand, cases of aggression can be defined between parties to a special agreement as against the state feared, and their armaments are capable of measurement and can be proportioned to the assistance offered. In other words, the technical details can be worked out among groups of states but not by a large number of states. (7) Special treaties are already in existence and it is better for the Council to recognize and control them than to have them carried out in secret. (8) General obligations, in so far as they are applicable, are contained in the Covenant. (9) Until a General Treaty has given some practical proof of its efficacy, special treaties are necessary.

PRIORITY TREATIES

It may also be pointed out that special treaties for mutual defense may escape both the Covenant and the Treaty of Mutual Assistance. When they are consummated between two or more states they may be regarded as regional understandings and thus be exempt under Article 21 of the Covenant; in which case, the parties may determine the fact of exemption.[22]

[22] See Chap. I; p. 33.

Article 14 of the Treaty makes provision for the following exemptions:

"Nothing in the present Treaty shall affect the rights and obligations resulting from the provisions of the Covenant of the League of Nations or of the Treaties of Peace signed in 1919 and 1920 at Versailles, Neuilly, Saint-Germain and Trianon, or from the provisions of treaties or agreements registered with the League of Nations and published by it at the date of the first coming into force of the present Treaty as regards the signatory or beneficiary Powers of the said Treaties or agreements." [23]

Since the Treaty of Mutual Assistance has been under discussion as a possibility, a number of special treaties of defense have been negotiated.[24] These would be exempt under the foregoing provision. Furthermore, all treaties negotiated between the date of signature and the time the Treaty comes into force would also be exempt. This would give ample time for all states wishing to enter into complementary agreements to execute them in time to exempt them if necessary as priority treaties. Between Article 14, exempting all prior treaties, and Article 17, permitting partial or conditional adherence, few states would know upon what assistance they could rely under a General Treaty.[25]

DISARMAMENT

But these elaborate provisions for assistance and complementary agreements are contingent upon a single factor, possibly more uncertain than security and assistance. The peg upon which all else hangs is disarmament. Unless a state agrees to reduce or limit its armaments and has either done so or taken satisfactory steps to carry out its obligation, it will receive no general assistance; and presumably cannot be called upon to contribute any assistance. No reduction of arms, no assistance is the formula. This raises the question as to which act is first to be performed—assistance or disarmament. Since the act of disarmament appears to be an absolute condition precedent, it becomes of the utmost importance to understand the manner in which it is to be accomplished.

Article 2 provides that "the High Contracting Parties *jointly* and *severally* undertake to furnish such assistance in accordance with the provisions of the present Treaty to any of their number, should the

[23] The proposal made by the Committee of Jurists that the Lausanne Treaty of 1923 be included among the exemptions was rejected, thereby presumably alienating the adherence of Turkey at some future time.

[24] See Chap. XXXVI; p. 709.

[25] For hypothetical cases, see Annex VII.

latter be the object of a war or aggression;[26] provided that it has conformed to the provisions of the present Treaty, regarding the reduction or limitation of armaments." Article 11 specifies the procedure which is to be followed in order to render such reduction or limitation effective as follows:

"The High Contracting Parties, in view of the security furnished them by this Treaty and the limitations to which they have consented in other international treaties, undertake to inform the Council of the League of the reduction or limitation of armaments which they consider proportionate to the security furnished by the general Treaty or by the defensive agreements complementary to the general Treaty.

"The High Contracting Parties undertake to co-operate in the preparation of any general plan of reduction of armaments which the Council of the League of Nations, taking into account the information provided by the High Contracting Parties, may propose under the terms of Article VIII of the Covenant.

"This plan should be submitted for consideration and approved by the Governments, and, when approved by them, will be the basis of the reduction contemplated in Article 2 of this Treaty.

"The High Contracting Parties undertake to carry out this reduction within a period of two years from the date of the adoption of this plan.

"The High Contracting Parties undertake, in accordance with the provisions of Articles VIII, paragraph 4, of the Covenant, to make no further increase in their armaments, when thus reduced, without the consent of the Council."

It is not clear at which point in this circle of assistance-disarmament, the actual process of either is to begin. The signatory states are to inform the Council of the reduction of armament they consider proportionate to the security they are to receive; but there seems to be no provision made for states to notify the Council concerning the amount of assistance it may requisition from them. Practically speaking, a state will disarm and cease to rely upon itself only when it is assured that other states possessing the requisite armies, navies and aeroplanes will come to its assistance. In the next step, states agree to co-operate in a general plan of reduction, but there is no corresponding general plan of assistance; that is left to the discretion of the Council. Also, this general agreement to furnish assistance is to take into consideration the amount of security to be furnished under any special agreements into which a state may have entered. States in agreeing to this General Treaty apparently do so blindly,

[26] The Committee of Jurists proposed the addition of the words: "forbidden by the Covenant of the League of Nations either on account of its origin or its object" after the word aggression; but the proposal was rejected.

not knowing to what extent they must rely upon their special agreements in relation to their claim for general assistance. As the Treaty is drafted there is nothing to prevent the Council from informing a state that it considers the special treaty sufficient and that it will therefore furnish no general assistance. This procedure is complicated by the fact that states may not be willing to divulge to the Council the precise terms of their agreements with other states, especially upon technical matters.

But the general plan of reduction of armaments is subject to another delay. When a state has submitted its estimate and all of the estimates have been worked into a general plan, the different governments must give their approval to the entire scheme. A government may take into consideration many elements: It may be dissatisfied with the ratio of reduction prescribed for it, or it may think the ratio of reduction for a friendly neighboring state too great; or regard that of an unfriendly state as too low. Or a state may be suspicious of special treaties among its neighbors and desire a protection equal to their combined strength.

But were it so to happen that agreement is reached, then each state must within two years either have accomplished its ratio of reduction or taken satisfactory steps thereto. It further agrees to make no increase in the prescribed armaments without the consent of the Council. Attention has already been drawn to the provisions of Article 17, wherein a state may, with the consent of the Council, and without the consent of other signatory states, limit its own commitments for rendering assistance under the Treaty. Therefore, a state signing the Treaty, and relying upon the military forces of a powerful state may find itself deprived of that assistance without its consent but upon the mere approval of the Council and unable to increase its own armaments to offset the loss without the consent of the Council.

The practical difficulties in this scheme for disarmament appear to be insurmountable in the following respects: (1) Delay in securing estimates of reduction in the absence of specific assurances to a state as to precisely what assistance it will receive in return for the reduction. (2) Delay, errors, and incompleteness in statistics upon armaments, and impossibility of either quick or accurate verification. (3) Unwillingness of a state to enter into a general scheme unless it is satisfied with the proportion of reduction for itself, friendly states and unfriendly states, neighboring states and other elements considered by it to be vital to its defense. (4) Reduction of armaments

which may reduce defenses at home; at the same time making a state liable to send part of this reduced equipment to other states upon call of the Council. (5) Uncertainty in the matter of assistance as to immediacy, adequacy, adaptability, and mobility of the forces furnished if not properly correlated to the reduction of armaments. (6) No provisions seem to be made for a plan of assistance commensurate with the plan for reduction of armaments. (7) The reduction of armaments, commensurate with a security which will reassure states to the point of disarming, is complicated by the fact that some states are already disarmed to the point of national safety. There are also states whose international status prohibits them from using their forces outside of their own territory (as Bulgaria and Hungary). Such countries, while requiring assistance are not in a position to furnish it, being already disarmed. These are, however, not exempted unless the Council should do so under Article 17. Other states have not yet determined what the lowest point of armament should be and have no final program laid down—as in Brazil. (8) Again, if states placed in a strategically unfavorable position believe the reduction in armaments of their unfriendly neighbors to be insignificant, they will clamor for an increase in their own ratio; if they find reduction placed high in friendly neighboring states they will fear that they will have to receive assistance from further away; which fact, in the event of attack, increases the delay; or which lessens the chances of that state being willing to send assistance to others.

It is true, the Council may decide to apply economic sanctions, invoke by name the High Contracting Parties, determine the force they are to supply, prescribe measures for priority of communications, and prepare plans for financial co-operation and appoint a Higher Command. But in actual warfare, what do these generalities mean? A state charged with the duty of defending the liberty and homes of its people which is requested to disarm is entitled to know in advance upon what specific assistance it may rely, but in the present Treaty there is no specific assurance. Great Britain and France may not agree upon the assistance each is to furnish and the Council is deadlocked and the assistance delayed. Italy may decide that it can furnish machine guns but not soldiers when the attacked state needs men. Parliaments may bicker over the requisitions of the Council and ask for a legal interpretation of the provisions of the Treaty. The people of a state may rise and protest against their sons being sent to far off lands on orders from the Council whose motives they can not fathom.

RATIFICATION AND WITHDRAWAL

States desiring to reduce their armaments are, however, confronted with another uncertainty in their guarantee of assistance. Article 18 provides that the Treaty shall come into effect under the following conditions:

"The present Treaty shall be ratified and the instruments of ratification shall be deposited as soon as possible at the Secretariat of the League of Nations.

"It shall come into force:

"In Europe when it shall have been ratified by five States, of which three shall be permanently represented on the Council;

"In Asia when it shall have been ratified by two States, one of which shall be permanently represented on the Council;

"In North America when ratified by the United States of America;

"In Central America and the West Indies when ratified by one State in the West Indies and two in Central America;

"In South America when ratified by four States;

"In Africa and Oceania when ratified by two States.

"With regard to the High Contracting Parties which may subsequently ratify the Treaty, it will come into force at the date of the deposit of the instrument.

"The Secretariat will immediately communicate a certified copy of the instruments of ratification received to all the signatory Powers.

"It remains understood that the rights stipulated under Articles 2, 3, 5, 6, and 8 of this Treaty will not come into force for each High Contracting Party until the Council has certified that the said High Contracting Party has reduced its armaments in conformity with the present Treaty or has adopted the necessary measures to ensure the execution of this reduction within two years of the acceptance by the said High Contracting Party of the plan of reduction or limitation of armaments."

Article 19 provides that the present Treaty shall remain in force for a period of fifteen years and may be prolonged automatically for the states which have not denounced it. But when one of the key states mentioned in Article 18 denounces it, the Treaty shall cease to exist from the date the denunciation takes effect, which denunciation takes effect within twelve months after the notification has been communicated to the Secretary-General of the League of Nations.[27] Therefore, when a state has put into effect a reduction in armaments it may find at the close of twelve months that it is without the assistance of the very power whose ratification caused it to accept a reduction of armaments; and if that state is a key state for that continent, the state so disarmed may find itself without any means of assistance whatever unless war

[27] Prof. Erich in the *Revue de Droit International*, 1924, Nos. 1-2, has raised the question whether it can be abrogated under fifteen years.

operations are in progress at the time that state withdraws.[28] The Treaty does not specify, however, to what degree the state withdrawing shall continue its obligation of assistance during the delay of one year. This article should also be read in connection with Article 11, which provides that a signatory state will make no increase in its armaments without the consent of the Council. Therefore, a signatory deprived of the assistance of a state upon whose support it had counted may not meet the danger without the consent of the Council; and if for any reason, that consent is withheld, such a state must be exposed either to increased danger or must violate the terms of the Treaty.

When this question was before the Third Committee some of the states sought to include other requirements from states in consideration of their receiving assistance, as, for instance, that they should register all treaties, sign the optional clause, and should have submitted their disputes under Article 15 of the Covenant before resorting to war. These proposals were rejected.

DEMILITARIZED ZONES

It remains to point out one other measure to promote security, contained in the Treaty. Article 9 provides as follows:

"In order to facilitate the application of the present Treaty, any High Contracting Party may negotiate, through the agency of the Council with one or more neighbouring countries for the establishment of demilitarized zones.

"The Council, with the co-operation of the representatives of the Parties interested, acting as Members within the terms of Article IV of the Covenant, shall previously ensure that the establishment of the demilitarized zone asked for does not call for unilateral sacrifices from the military point of view on the part of the High Contracting Parties interested."

The Committee of Jurists was opposed to the wording of paragraph 1 on the ground that it was not limited to signatories of the Treaty; and made the following observation:[29]

"The object of this provision is apparently to oblige States to reply to any invitation addressed to them by a neighbouring State to have the question of creating a demilitarized zone examined before the Council. This obligation is not contained in the Covenant. It would therefore seem necessary to make it clear that it applies only to the High Contracting Parties.

"Lastly, the Committee of Jurists thinks it necessary to point out to the Third Committee that the draft did not define the legal consequences of such neutralization agreements. Are they complementary to the general Treaty of

[28] This assumes that Articles 10 and 16 of the Covenant remain as inactive as during the past five years.

[29] *Records of the Fourth Assembly*, Minutes of the Third Committee; p. 193.

Mutual Assistance, and does the violation of a neutral zone constitute a *casus foederis?*"

The Permanent Advisory Committee was opposed to the creation of such zones as being impractical and useless to prevent war. The provision created so vague an impression that further specifications were requested from Viscount Cecil. He furnished a supplemental memorandum in which were set forth the specifications that such zones should be fifty kilometers wide, they were to possess no military establishment or fortifications, the inhabitants were not to be subject to conscription nor to receive military training, and there was to be no manufacture of arms. They were to be supervised by Commissioners of the League, appointed by the Council, and resident in the zone. In case of aggression, an international police force was to be provided. These provisions would in effect establish territories under the administration of the League, with no forces to protect them in time of war. The administrative ability of the Council has as yet carried little assurance to people who have experienced its application within such neutral zones.[30]

RELATION BETWEEN COVENANT AND TREATY

With these various proposals in mind, the question naturally arises: What would be the relationship between the Treaty and the Covenant; and what body would determine the legal aspects of the important questions which will arise under the two parallel systems? For the Treaty undertakes to harmonize in a common scheme several independent peace plans.[31] (1) The Covenant is a plan of mutual assistance prohibiting aggression, requiring arbitration, providing mutual assistance, and favoring disarmament. Its predominating qualities are its moral influence and right of recommendation and absence of inherent military power. (2) The Treaty of Mutual Assistance amplifies Articles 8, 10 and 16, giving military power to the Council which it does not enjoy under the Covenant and laying upon states obligations and liabilities not included within the Covenant. (3) The Special Treaty, authorized under the second plan, constitutes a scheme operated independently of the General Treaty and of the Covenant by the states themselves. (4) Priority treaties are not affected by the Treaty, but may be put into operation subject to Article 20 of the Covenant or be exempt as regional understandings under Article 21 and know no restraint but that im-

[30] For account of demilitarized zones established in the Vilna district by the Council, see Chap XI; p. 258.

[31] For the hypothetical cases which may arise under the administration of these various plans, see Annex VII.

posed by the signatories. (5) The administration of demilitarized zones is an accompaniment to each or all of these plans.

Certain of these schemes appear to be incompatible with others. The following indicate somewhat of the nature of these differences: (1) Under the Covenant, the Assembly shares with the Council the right to hear disputes which contain a menace of war; under the Treaty the Assembly has no rights and the Council enjoys a monopoly; although the Treaty is to facilitate the application of Articles 8, 10 and 16 of the Covenant. (2) Under the Covenant, states agree to submit a matter to arbitration or inquiry by the Council and not to resort to war within three months after the award; under the Treaty, the Council approves of agreements permitting automatic warfare without waiting for a decision of the Council as to the aggressor. (3) Under the Covenant, the Council makes recommendations; under the Treaty, it renders final decisions which states agree in advance to accept. (4) Under the Covenant, a deadlock under the rule of unanimous vote may be broken by a majority report of the Council; under the Treaty, no relief is provided, and although the Council is required to render a decision within four days, there is no alternative procedure when it does not do so. (5) Under the Covenant, non-member states are entitled to certain considerations and rights; under the Treaty, non-signatory states are altogether ignored, although the Council may decide that they are aggressors guilty of the crime of war, and call upon states to render assistance to their adversaries. (6) Under the Covenant (Art. 10), a member state is entitled to assistance without conditions from member states when it is the object of aggression; under the Treaty, it must first have reduced armaments according to a schedule satisfactory to the Council. (7) Under the Covenant, all states share alike in receiving assistance (Article 16); under the Treaty, restrictions are imposed concerning geographical location, reservations are permitted, and the Council may select the states to furnish assistance. (8) Under the Covenant, any member may call the attention of the Council or Assembly to any circumstance threatening peace; under the Treaty, only the state apprehending aggression may appeal to the Council. (9) Under the Covenant, the sanctions of Article 16 are applicable only when the Covenant is violated in respect to Articles 12, 13 and 15; under the Treaty, these sanctions may be extended to states which have violated no known law, but which may, on the contrary, be acting in accordance with the accepted principles of international law. (10) Under Article 18 of the Covenant, treaties are to be registered and published; under the Treaty, special agreements need only to be reg-

istered. (11) Under Article 8 of the Covenant, states accept the principle to reduce armaments; under the Treaty, they may either reduce or limit armaments. (12) Under the Covenant, states have preserved intact their sovereignty; under the Treaty, they agree to forego their right to judge the merits of a controversy, or to question a decision of the Council; or to control the reduction of their armaments; or to determine the amount or kind of military or other service which they will render to other states; also they agree to grant rights of transit and communications, thereby foregoing the exercise of their rights of neutrality. (13) The Covenant deals with but two groups of states, members and non-members, with a definite procedure to be followed in the event of disputes in which a member or non-member is involved; the Treaty creates additional groups, there being four classes to consider: (a) Member states adhering to both Covenant and Treaty; (b) members of the League adhering only to the Covenant and refusing the Treaty; (c) non-member states of the League accepting the Treaty; and (d) non-member states accepting neither the Treaty nor the Covenant.

The Council, acting sometimes under the Covenant and at other times under the Treaty, is to enforce these two sets of provisions, presumably using them interchangeably according to the circumstances of the case and whether the parties are signatory to the Covenant or the Treaty, or both or neither. Under such circumstances, in the event of an aggression by a member of the League, claiming the application of the Treaty against another member claiming the privilege of the Covenant, the Council will have the makings of a new controversy before it can proceed to stop war. In the event of threatened aggression between a member of the League and a signatory to the Treaty, involving a non-member state not signatory to either, will the Council proceed under Article 17 of the Covenant or under Article 3 of the Treaty?

This enormous extension of power to the Council would completely change its character from an advisory body to its members to an executive body exercising control over them. For without amending the Covenant, with the assent of member states which have created the Council, this Treaty grants to the Council, to the exclusion of the Assembly, practically all of the powers contained in Articles 8, 10 and 16 of the Covenant. In addition, it establishes the Council as the military dictator of Europe, which would inevitably involve Council members in fresh disputes with states against whom the Council might

direct its military forces and also in disagreements with their sympathizers.

These practical problems are quite aside from the constitutional question, raised elsewhere, whether the signatories to the Treaty could endow the Council with powers contrary to those now exercised by it under the Covenant without the express approval of all members of the League.[32]

THE COURT OF JUSTICE

It is apparent, that from the application of these various systems, the greatest confusion will arise; and that the controversies will involve legal questions and the acts of the Council. What then is to be the position of the Permanent Court of International Justice in this scheme? It will be recalled that Article 1 contains a reference to verdicts of the Court, but no provision is made for referring matters to the Court by the parties. Instead, the Council repeats the procedure of 1920 when it created the Court and has isolated it from the consideration of any actual dispute which may arise. The Treaty contains, however, the following provision in Article 15:

> "The High Contracting Parties recognize from to-day as *ipso facto* obligatory, the jurisdiction of the Permanent Court of International Justice with regard to the interpretation of the present Treaty."

The jurisdiction of the Court therefore appears to be compulsory for the signatory states whenever a question of interpretation arises between them. But this jurisdiction does not seem to extend to any question of interpretation as between the Treaty and the Covenant with respect to complementary agreements, for the Council has expressly reserved that right in the first paragraph of Article 7 of the Treaty. In Article 4, the signatory powers agree to *accept the decision of the Council in advance;* therefore, they are not in a position to bring before the Court any question of the interpretation of any decision of the Council, involving either the terms of the Treaty or of the Covenant or any matter with which they may be in conflict. There being no appeal from the decisions of the Council, it is the final judge of its own acts.

That it was not the intention of the Council to regard matters arising under the Treaty as anything but political and therefore within its sole jurisdiction is apparent from the discussions in the Third Committee. For instance, on September 21st, M. Lange inquired if the question whether there had really been aggression could be submitted to the Permanent Court. Viscount Cecil replied in the negative, stating that

[32] For practical relation between the Covenant and Treaty, see Annex VII.

this was a purely political question to be left to the competence of the Council.

A cursory examination of the powers which the Council would acquire under the Treaty indicates the relative position which the Council and the Court would occupy under the terms of this Treaty. (1) The Council alone may receive complaints and render decisions. (2) Its recommendations under the Covenant now become decisions to be accepted in advance. (3) States assign to the Council their right to judge of the merits of a dispute, the right to stipulate the assistance they shall render, and the direction of their forces when sent into the field. (4) The Council will apply the economic sanctions now vested in the states. (5) It will select the states to render assistance. (6) It will denounce the state guilty of a crime of aggressive warfare and may call out assistance against it. (7) It will assess the costs and reparations. (8) It will examine and decide when complementary agreements are in accordance with the terms of the Covenant and Treaty. (9) It will decide upon the plans for disarmament, and it is the judge when a state has sufficiently complied with the plan agreed upon to be certified for assistance. (10) It ensures that demilitarized zones do not call for a unilateral military sacrifice from the interested parties and will govern such zones. (11) It passes upon the terms of conditional or partial adherence of a signatory state to the Treaty. (12) The Council is the repository for all information concerning disarmament and assistance, and the Secretary-General is the custodian of all ratifications and withdrawals.

Lithuania was concerned lest this increased authority to the Council should disturb its unfriendly relations with Poland and included in its declaration, explaining its vote, the following paragraph:[33]

> "That it shall be obligatory upon all States signatories to submit to the jurisdiction of the International Court or to some other impartial authority, if not all the disputes which may arise, at any rate disputes of the nature of those provided for by the Covenant of the League of Nations."

The attitude of the Council in thus excluding judicial determination of all controversies, and in retaining control of important legal questions as political questions, leads to further observations. The Court renders its decisions by a majority vote; in the Council the vote of any one power controls, therefore the *effective* control by any one of a few powers of all questions arising under this Treaty is obviously lodged in the Council. The Court is presumably free from the dictation to its members by the foreign offices of its nationals on the bench; the Council

[33] *Records of the Fourth Assembly,* Minutes of the Third Committee; p. 99.

necessarily represents the views of these offices and the most powerful at the moment either dominates the Council or may negotiate its power for some other desirable object. Expediency is therefore better served through the Council. The Court always has a full bench and with the same personnel which has no immediate or personal interest in the results of its deliberations. The Council is an arena for political manoeuvering for advantage and, in the event of parties to special treaties not voting, will not represent a full vote. The Court would render only judicial decisions. The Council under the Treaty is legislator, executor and judge, and combines the functions of a military dictatorship and a supreme Court.

It must therefore be a matter of sincere regret to all advocates of peace and upholders of justice to find in this last European word upon peace and war, nothing but a resort to force, and the advancement of the political authority of the Council at the expense of the judicial authority of the Court. This preference for force over law at the hands of the creators of the Court is not a guarantee of peace, but is a forerunner of war.

PRESENT STATUS OF THE TREATY

The Fourth Assembly received the Draft Treaty from the Third Committee and passed the following resolution:[34]

"The Assembly,

"Having taken cognizance of the draft Treaty of Mutual Assistance drawn up by the Temporary Mixed Commission and amended by the Third Committee as a result of an exchange of views between its members, some of whom spoke in their personal capacity;

"Considering that this discussion has revealed some divergencies of view and, further, that a large number of Governments have not yet expressed their opinions on Resolution XIV of the third Assembly;

"Decides to request the Council to submit the draft Treaty of Mutual Assistance to the Governments for their consideration, asking them to communicate their views in regard to the aforesaid draft Treaty."

Several declarations were read by the various delegations before the draft was approved, including that by the Italian delegation, summing up the situation as follows:[35]

"The full discussion which has taken place in the Third Committee, the profound divergence of opinion which has been manifested, the many different proposals made by the Committee of Jurists, the fact already pointed out by several speakers that some delegates have expressed purely personal opinions on this matter, and, finally, the repeated references to its imperfections

[34] *Records of the Fourth Assembly,* Minutes of the Third Committee; p. 98.
[35] *Ibid.,* p. 99.

which M. Benes has made in his remarkable report, have, the Italian Delegation regrets to say, strengthened its opinion that the draft Treaty is far from providing a reliable basis for the achievement of the aim pursued by the League of Nations in this matter.

"The motions submitted by the French, Italian and other Delegations are clear evidence of the perplexity experienced by many delegates, as well as of their desire that the question should be submitted to the States which they have the honour to represent here for more mature consideration.

"It is with this expectation that the Italian Delegation will vote in favour of the resolution to refer the draft Treaty to the Governments, and against the draft Treaty itself."

In accordance with the resolution, the Treaty was submitted on October 25th, 1923, to various governments, including that of the United States, for their views. Up to the time the Council met in March, 1924, but three replies had been received. On July 10th, 1924, the United States Department of State made public its reply to a request from the League of Nations concerning its views on the draft Treaty. The communication, while congratulating the League upon its efforts to reduce armaments, a subject in which this country is deeply interested, declined adherence to the Treaty for the following reasons:[36]

"Without attempting an analysis of these provisions, or of other provisions of the draft Treaty, it is quite apparent that its fundamental principle is to provide guarantees of mutual assistance and to establish the competency of the Council of the League of Nations with respect to the decisions contemplated, and, in view of the constitutional organization of this Government and of the fact that the United States is not a member of the League of Nations, this Government would find it impossible to give its adherence.

"The Government of the United States has not failed to note that under Article 17 of the draft Treaty 'any State may, with the consent of the Council of the League, notify its conditional or partial adherence to the provisions of this Treaty, provided always that such State has reduced or is prepared to reduce its armament in conformity with the provisions of this Treaty,' but it would not serve a useful purpose to consider the question of a conditional or partial adherence on the part of the Government of the United States when the conditions imposed would of necessity be of such a character as to deprive adherence of any substantial effect."

Great Britain has expressed its views as being unfavorable to the Treaty on the grounds that (1) carrying out the obligations would involve an increase rather than a decrease in British armaments. (2) The uncertainty and difficulty of ascertaining what constitutes an act of aggression and the difficulties involved in arriving at a decision within four days. (3) The long delay inevitable in getting relief into action under the general Treaty against the aggressor state. (4)

[36] New York *Times;* July 10th, 1924.

Public opinion within states may be such as to prevent the rapid execution of military plans. (5) The guarantees provided are so precarious that no responsible government would consent to disarm. (6) Regional treaties will tend to recreate the former system of alliances and counter alliances. (7) The Council would become an executive body with large powers instead of an advisory body with small powers. (8) The control of military forces in operation by the Council would complicate international relations. (9) The Court does not occupy a sufficiently important role.[37]

Russia has declined adherence on the following main grounds: (1) It gives the League Council the right to bind member states to declare hostilities against a country declared an aggressor. (2) Regional alliances are not measures of peace. (3) The question of limitation of armaments should be separated from the establishment of an international organization for the prevention of war. It takes the occasion for the rejection of the Treaty to state its own program as follows:[38]

"1. Parallel disarmament agreements between various states.

"2. The basing of armaments upon the size of the population and resources of the countries concerned.

"3. The fixing of the military budgets of all states and compelling the disbandment of all irregular forces.

"4. The creation between neighboring states of demilitarized frontier zones subject to inspection by mixed commissions."

It is reported that France will accept the terms of the Draft Treaty;[39] thus indicating a difference of opinion between the Allied Powers, which will be the subject of discussion at the September (1924) meeting of the Assembly.

The Treaty of Mutual Assistance has failed to observe the four fundamental elements required for security. It does not guarantee any state against territorial aggression, for it promises but a vague assistance and admits its own incompetence in facilitating special military alliances among states. It does not prevent minorities from becoming a menace to peace; it imposes costs of war in a manner to further alarm states; and it infringes upon state sovereignty by constituting the Council the military dictator of Europe.

It has, however, precipitated throughout Europe a new controversy: namely, whether military assistance and disarmament are inseparable. The exact place which each shall occupy in relation to the other will doubtless furnish the groundwork for a discussion no less absorbing and complicated than that which has obtained for disarmament.

[37] New York *Times;* July 19th, 1924.

[38] *Christian Science Monitor;* March 24th, 1924.

[39] New York *Times;* July 26th, 1924.

CHAPTER XXXVIII

TREATY OF DISARMAMENT AND SECURITY

The differences of opinion between states in favor of a general treaty of assistance and states committed to a policy of special treaties; and between those who believe in moral sanctions and those who have favored military guarantees, created a deadlock among the members of the League which has imperilled adoption of the Treaty of Mutual Assistance in its present form. The known attitude of Great Britain, the United States and Russia has made impractical its application. The scheme to control the traffic in arms which is to be presented to the Fifth Assembly is known to contain provisions which will provoke discussion, if not dissentions, not unlike in intensity that affecting the Treaty of Mutual Assistance. All of these recommendations are based upon war as a recognized institution and upon the legitimate use of force to keep international peace.

In view of these circumstances, it became a question whether the League could find a substitute for the Treaty of Mutual Assistance which would retain some of the provisions of that Treaty and at the same time appeal to the United States. The growth of the American movement to outlaw war and the increasing demand for security in Europe led to the suggestion that the three proposals—outlawry of war, disarmament, and security—be embodied in one treaty, to be drafted by Americans.

The advocates of the American movement to outlaw war, under the leadership of Senator Borah and the Hon. S. O. Levinson, seem not to have been aware of this undertaking, the first intimation being received in press despatches from Geneva on the morning of June 18th, 1924, wherein the League Council announced that it had distributed to members of the League a report prepared by an American committee of private citizens,[1] and entitled a Draft Treaty of Disarmament and

[1] The group consists of the following: Dr. James T. Shotwell, professor of History at Columbia University, a member of the American delegation at the Paris Peace Conference and a commissioner of the Labor Section of the Treaty; General Tasker H. Bliss, American representative on the Supreme War Council; Dr. Isaiah Bowman, executive head of the technical experts of the American delegation at the Paris Peace Conference; Dr. Joseph P. Chamberlain, professor of Public Law at Columbia University; Professor John Bates Clark, former Director of the Division of Economics and History of the Carnegie Endowment for International Peace; Dr. Stephen P. Duggan, Director of the Institute for International Education of the Carnegie Foundation; General James G. Harbord,

Security. This draft consists of a preamble and five parts dealing respectively with the subjects of (1) the outlawry of war; (2) disarmament; (3) international information; (4) treaties of mutual assistance; and (5) parties to the treaty. An analysis of the report constitutes the subject of the following discussion.

THE PREAMBLE

The Preamble states the object of this Treaty to be as follows:

"The High Contracting Parties, being desirous of promoting peace and of lessening the danger of war by reduction and limitation of armaments, agree to this Treaty."

In a document, issued by the Foreign Policy Association, purporting to have the approval of Dr. Shotwell, one of the authors of the Treaty, and therefore authentic, it is stated that the task of the American Committee was to harmonize the American point of view concerning the outlawry of war and disarmament and the European point of view concerning security.[2] It will be noted that in so far as the Preamble is concerned, there is no mention that war is to be outlawed or that this is a purpose of the Treaty. On the contrary the High Contracting Parties agree to the Treaty for the sole purpose of *lessening the dangers of war* (not its abolition), by the reduction and limitation of armaments. Thus, the preamble is predicated upon the war system not against it and disarmament is the method to be used in lessening its dangers. This introduction to the Draft Treaty is not unimportant in view of other provisions which appear later, tending to disclose the fact that disarmament is the main objective.[3]

PART I—OUTLAWRY OF AGGRESSIVE WAR

The proposal to outlaw war is contained in the first two chapters of the Draft Treaty, comprising seven articles, which read as follows:

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former Chief of Staff of the American Army; Frederick P. Keppel, former Assistant Secretary of War; David Hunter Miller; legal adviser to the United States Government at the Paris Peace Conference; and Dr. Henry S. Pritchett, President of the Carnegie Foundation.

[2] Text of the *Draft Treaty of Disarmament and Security.* (Pamphlet No. 28, Series of 1923-24, June, 1924; p. 8; published by the Foreign Policy Association of New York.)

[3] This Preamble should be compared with that of the Borah Resolution (No. 441, 67th Congress, Fourth Session, p. 789). This Resolution in its preamble condemns the institution of war and places the entire emphasis upon the abolition of war; the Disarmament and Security Draft preamble does not mention war but places the entire emphasis upon reduction of armaments. The different approaches are therefore made clear at the outset; outlawry of war in the Borah Resolution is an end in itself; in the Disarmament and Security Draft Scheme, the end sought is reduction of armaments.

"Article 1. The high contracting parties solemnly declare that aggressive war is an international crime. They severally undertake not to be guilty of its commission.

"Article 2. A State engaging in war for other than purposes of defense commits the international crime described in Article 1.

"Article 3. The Permanent Court of International Justice shall have jurisdiction, on the complaint of any signatory, to make a judgment to the effect that the international crime described in Article 1 has or has not in any given case been committed.

"Article 4. The high contracting parties solemnly declare that acts of aggression, even when not resulting in war, and preparations for such acts of aggression, are hereafter to be deemed forbidden by international law.

"Article 5. In the absence of a state of war, measures of force by land, by sea or in the air taken by one State against another and not taken for purposes of defense or for the protection of human life shall be deemed to be acts of aggression.

"Any signatory which claims that another signatory has violated any of the terms of this treaty shall submit its case to the Permanent Court of International Justice.

"A signatory refusing to accept the jurisdiction of the Court in any such case shall be deemed an aggressor within the terms of this treaty.

"Failure to accept the jurisdiction of the Court within four days after submission of a claim of violation of this Treaty shall be deemed a refusal to accept the jurisdiction.

"Article 6. The Court shall also have jurisdiction on the complaint of any signatory to make a judgment to the effect that there has or has not in any given case been committed a violation of international law within the terms of Article 4.

"Article 7. The Permanent Advisory Conference hereinafter mentioned shall from time to time consider the further codifying of the principles of international law relating to acts of aggression and preparations for such acts.

"In this regard, the Conference shall take into account the additional security to the signatories and the progressive disarmament which are by this treaty contemplated.

"The recommendations of the Conference shall be submitted to the high contracting parties for their adoption, and shall also be transmitted to the Permanent Court of International Justice."

As a declaration of principles, intended to form the basis of discussion, this plan will be subscribed to at once by individuals or organizations in favor of the abolition of war and of the removal of this single great obstacle to the restoration of confidence and good will among nations. As an operating plan, however, to which responsible nations will subscribe in the belief that it will accomplish its objective, the Draft Treaty presents certain proposals which require careful consideration and discussion, if the idea of the out-

lawry of war is not to perish by reason of its new environment. The following observations are therefore directed, not to the substance of the idea, but to the form in which it is presented for consideration.[4]

AGGRESSIVE WAR AND ACTS OF AGGRESSION

What precisely does the Draft Treaty prescribe in the foregoing articles? (1) That a state shall not engage in war except for defense; (2) in the absence of a state of war any measures of force used by one state against another, not for defense nor for the protection of human life, is an act of aggression; (3) preparations for acts of aggression are deemed to be forbidden by international law.

It will be observed that a court called upon to deal with a violation of any one of these provisions would find no definition as to what constitutes aggressive or defensive warfare and would have to construct the principles of a new form of international law from the facts submitted. This would invest the court with legislative functions. Furthermore, the difficulty of this task is increased by the fact that all existing international law, all conventions, the Treaties of Peace, the Covenant, international customs, and all principles of law, recognized by civilized nations (none of which conventions, customs or principles are hereby repealed by the Draft Treaty), are based upon the principle that aggressive war is honorable and legal. To carry on such warfare, nations have become parties to agreements which regulate the laws and customs of war on land; the rights and duties of neutral powers, the status of enemy merchant ships at the outbreak of hostilities and their conversion into warships; the laying of mines, the bombardment by naval forces; and rights of capture. Some, if not all of these conventions were violated during the Great War, but they have not been formally abrogated. No effort is made in the Draft Treaty to repeal the regulations which recognize and authorize aggressive warfare, nor to bring that instrument into harmony with existing law. It may be questioned whether the institution of war can be thus disposed of by a phrase in the Draft Treaty.[5]

But if it is intended to disregard the body of law which recognizes warfare, and accuse a state of the crime of aggressive warfare, it will be observed that no body of law against war is provided in its

[4] The substance of the idea of the outlawry of war is the subject of Chap. XXXIX.

[5] Article 10 of the Covenant contains the only definition of aggressive war, with respect to territory. While the Court might be guided by this provision for member states such would not be the case for non-members of the League.

place. In the event that a state is accused of the crime of committing aggressive war, by what definitions and principles of law will the Court be guided? Precisely what is the international law that distinguishes aggressive from defensive warfare? Under what circumstances, and at what point does defensive warfare cease and aggressive war begin? And, in the event that a state begins war under Article 24 under a mistaken apprehension of a menace of aggression what rule will be applied?[6] The Temporary Mixed Commission and the Third Committee of the Fourth Assembly struggled with this problem and adopted a definition of aggressive warfare recognized only by an exception to it.[7] The American Committee has adopted a definition recognizable only by describing something else.[8] The Treaty of Mutual Assistance was rejected by Great Britain because of the vagueness of Article I; and the Draft Treaty, not having remedied that defect, may not expect a more charitable consideration.

But a state may not be accused of the crime of war; it may perhaps be accused only of acts of aggression. If so, what legal guide is provided for the Court? These acts are defined to be any measures of force taken by one state against another, not for purposes of defense nor for the protection of human life. In the absence of any conventions among states defining specifying acts of defense or what is meant by the protection of human life and under what circumstances, the matter is one of fact in the discretion of the Court. In this age of scientific development, "measures of force" do not constitute a wholly simple term. The sub-committee of the Temporary Mixed Commission, charged with finding a means of determining acts of aggression, pointed out that political and military frontiers do not always coincide; that the difference between police, irregulars and armies in Europe is not always discernible; and that even violation of frontiers may be a defensive not an aggressive act.[9] It is probable that states may therefore require further specifications before granting compulsory jurisdiction to a court with a permanent personnel to determine acts of aggression.

Lastly, however, a state, not accused of the crime of aggressive warfare nor of acts of aggression, may be accused of preparations for acts of aggression as being in violation of international law. It is a

[6] See Annex VII.

[7] Text of Article I of the Treaty of Mutual Assistance, Chap. XXXVII; p. 719

[8] For discussion of this point in connection with the Treaty of Mutual Assistance, see Chap. XXXVII; p. 720.

[9] *Ibid.*, p. 723.

fundamental juridical principle that unless there is a law to be broken there can be no penalty for the breach of it. Not only is there no law laid down as to what these preparations shall include but the experience of the sub-committee which considered a similar phrase in the Treaty of Mutual Assistance has been disregarded.[10] The Permanent Advisory Commission pointed out that such preparations might consist of seven steps: (1) Organization on paper of industrial mobilization; (2) actual mobilization; (3) collection of stocks of raw materials; (4) setting on foot of war industries; (5) preparation for military mobilization; (6) actual mobilization; and (7) hostilities. The sub-committee of the Temporary Mixed Commission, however, pointed out that 1 and 5 were difficult to recognize; that No. 3 might be justified by economic conditions; that No. 4 was easily concealed, and that when Nos. 6 and 7 took place it was too late for preventive action. Taking into consideration the almost insurmountable difficulty of the Court's being able to obtain reliable information concerning the domestic concerns and foreign policies of a state, leaving to the discretion of the Court the interpretation of what constitutes "preparation for acts of aggression" is imposing upon that body a considerable burden.[11]

It may be said that in Article 7 provision is made for the consideration of the codification of the principles of international law relating to such acts of aggression and preparations for aggression. The answer is that the codification will take place sometime in the future and has no immediate bearing upon the substance of the Draft Treaty under examination. The Treaty must be dealt with as it stands and not on the basis of what a conference may determine in an indefinite future. Furthermore, the duty is entrusted to a body created primarily for other purposes, namely, disarmament, which may or may not be qualified to perform the foregoing juridical functions.

The questions, thus raised with regard to Articles 1-7, are not academic and they are not merely technical. On the contrary, they are matters to which responsible states are likely to direct their attention during any serious consideration of this Draft Treaty. Such has

[10] Chap. XXXVII; p. 722.

[11] The Borah Resolution avoided these difficulties by not undertaking snapshot definitions, but instead it requires that the basis of a statute to outlaw war shall be a code of international law which will state the existing principles of such law, re-establish the rules of law affected by the war; and formulate the modifications and additions necessary to bring the outlawry of war statute into the proper relation with laws regulating warfare. (See Chap. XXXIX; p. 789.)

been the experience of states with vague provisions and broad generalizations in Peace Treaties, that it may be assumed future international proposals, to obtain assent, will be of quite another order.

THE PROCEDURE

Article 5 contains the procedure for bringing violations of the terms of the Treaty before the Court. Any signatory state, being of the opinion that another signatory has committed an act of aggressive war, or an act of aggression, or that it is preparing for aggression, may complain to the Court. Thereupon the accused state without apparently being entitled to receive a copy of the complaint or due notice, must accept the jurisdiction of the Court within four days after submission of the claim of violation.

It will be observed that under these provisions no question is exempt, for any question whatsoever—domestic or international, political or legal, vital interest or matter of national honor, or the Monroe Doctrine—all of these are within the jurisdiction of the Court, if they be concerned in any complaint submitted. Therefore, all a state need do to bring such issues before the Court is to claim that they constitute violations of the terms of the Draft Treaty and it is then for the Court to decide the question of its own jurisdiction or the issue itself.[12]

In the event, however, that a state does not notify the Court of its acceptance of jurisdiction within four days, such failure is deemed to be a refusal and the state becomes an aggressor, presumably to be adjudged a defaulting state by the Court, whereupon the sanctions become applicable.[13]

It may be presumed, however, in the absence of any provisions to the contrary, that the Court will be governed in the conduct of cases arising under the Draft Treaty by the terms of its own charter, namely, Article 14 of the Covenant, and by the Court Statute; in which case the following questions arise: Will non-member states of the League, who become signatories to the Draft Treaty, be required to conform to

[12] The plan which constitutes the basis of the Borah Resolution was prepared by the American Committee for the Outlawry of War of which the Hon. S. O. Levinson is chairman. It avoids the certainty of rejection by the United States of any plan to outlaw war which does not protect domestic questions and the Monroe Doctrine, by making provision for their exclusion in principle and by name.

[13] It may have been the intention of the drafters to exclude, under Article 6, preparations for acts of aggression from the operation of this provision, but, if so, the intention appears not to be fully served by the phraseology.

the conditions laid down by the Council of the League under Article 36 of the Court Statute for the use of the Court by such non-member states? If so, then the terms upon which such non-members use the Court or whenever they are brought into the Court under compulsory jurisdiction will be governed by the Council. May the Council bring a violation of any of the terms of the Draft Treaty into the Court for an advisory opinion? In the event that a member of the League requests the Council to obtain an advisory opinion, will it be deemed to be a sufficient compliance with paragraph 2 of Article 5 which states that a signatory claiming a violation shall submit its case to the Court? In view of the prevailing practice to submit actual disputes for such opinions, a direct prohibition would perhaps be preferable to the mere inference that such opinions are excluded by the Draft Treaty.

It may also be questioned whether the Court of Justice is the proper court to try crimes of war or whether a High Court of Justice (such as Baron Descamps, chairman of the Advisory Committee of Jurists proposed) is not necessary.[14] The trial of a state for the crime of war is a different proceeding from settling a dispute or interpreting a point of law. At the present time, European states are concluding defensive military alliances against certain other states, and these are recognized as legal under Articles 23-25 of the Draft Treaty. Some of these states have nationals on the Court of Justice. The sense of justice revolts at the prospect of a state being tried for the crime of war by a court comprising within its body the nationals of states which have concluded military alliances either on behalf of or against the accused state. Upon the vote of one such national may depend the question of whether that state will be called upon to render assistance and then go to war; and as the Court decides by a majority, that one vote may well decide the issue. Were such judges to retire, it might be impossible to secure a full bench from the deputies, in view of the growing ramifications of these military alliances. Nor would the addition of a national of the accused state correct the difficulty for the practice of having a national on the bench, as permitted in arbitration, is not necessarily sound in international criminal law which is here being created.

It appears, therefore, as to the form of the first seven articles, constituting Chapters I and II, that the vagueness of the distinction between aggressive and defensive warfare, of acts of aggression, of preparations for acts of aggression, of purposes of defense, and of the protection of human life, and other phrases which have no accepted definition

[14] Chap. XXIV; p. 454.

in law, may militate against the acceptance of the proposed Treaty; that the existence of international agreements which now legalize warfare will either have to be abrogated or brought into harmony with this statute; that provision will have to be made for the exemption of domestic and other questions; and that the provisions of the Court Statute and of Article 14 of the Covenant should be considered in relation to their application to states which become signatories to the proposed Treaty.

SANCTIONS

Articles 8 and 9, constituting Chapter III, and Articles 10 and 11, constituting Chapter IV, relate to the sanctions and decrees of the Court and are as follows:

"Article 8. In the event of any High Contracting Party having been adjudged an aggressor pursuant to this Treaty, all commercial, trade, financial and property interests of the aggressor and of its nationals shall cease to be entitled, either in the territories of the other signatories or on the high seas, to any privileges, protection, rights or immunities accorded by either international law, national law or Treaty.

"Any High Contracting Party may in such case take such other steps toward the severance of trade, financial, commercial and personal intercourse with the aggressor and its nationals as it may deem proper and the High Contracting Parties may also consult together in this regard.

"The period during which any such economic sanction may be continued shall be fixed at any time, by the Court at the request of any signatory.

"In the matter of measures of force to be taken, each signatory shall consult its own interests and obligations.

"Article 9. If any High Contracting Party shall be adjudged an aggressor by the Permanent Court of International Justice, such power shall be liable for all costs to all other High Contracting Parties resulting from its aggression.

"Article 10. The High Contracting Parties agree to accept the judgment of the Permanent Court of International Justice as to the fulfillment or violation of the contracts of this Treaty.

"Any question arising under this Treaty is *ipso facto* within the compulsory jurisdiction of the Court.

"Article 11. If a dispute arising under this Treaty shall be submitted to the Permanent Court of International Justice, it is for the Court to decide as to its jurisdiction and also whether or not its decree has been complied with."

These provisions appear to be a re-phrasing of certain provisions of Article 16 of the Covenant. For purposes of comparison, their material parts are here reproduced as follows:

Article 16

"Should any Member of the League resort to war in disregard of its Covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the Covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

"It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League."

Article 8

"In the event of any High Contracting Party having been adjudged an aggressor pursuant to this Treaty, all commercial, trade, financial and property interests of the aggressor and of its nationals shall cease to be entitled, either in the territories of the other signatories or on the high seas, to any privileges, protection, rights or immunities accorded by either international law, national law or Treaty.

"Any High Contracting Party may in such case take such other steps toward the severance of trade, financial, commercial and personal intercourse with the aggressor and its nationals as it may deem proper and the High Contracting Parties may also consult together in this regard. * *

"In the matter of measures of force to be taken, each signatory shall consult its own interests and obligations."

It will be observed that in the adaptation of Article 16 of the Covenant to the Draft Treaty, the following changes have taken place: (1) Under Article 16 of the Covenant a state may create a general state of war by an act of war; under Article 8 of the Draft Treaty the Court constitutes it an outlaw when adjudging it an aggressor. (2) Under Article 16 of the Covenant a state undertakes to sever its economic relations with the offending state and to prevent intercourse between its nationals and those of its own state or any other state. Therefore, the direction of the sanctions is vested in the state [15] and its rights are preserved. But under Article 8 of the Draft Treaty international and national protective laws for the business and property of the outlaw state and its nationals are suspended and such nationals become the prey of any state, organization or individual who desires to take the sanction into its own hands. This amounts to a return of the highwayman system; for the severance of trade relations and intercourse by responsible states is quite a different matter from the destruction and confiscation of property which is permissible under a suspension of laws. (3) Article

[15] The International Blockade Commission prepared a series of resolutions to govern the application of Article 16 which are of interest in connection with the Draft Treaty; Chap. I; p. 16.

16 of the Covenant lays an obligation upon member states to undertake to apply these economic sanctions. Article 8 of the Draft Treaty states that they may take steps toward the severance of trade relations and personal intercourse if they so desire. (4) Article 16 of the Covenant prescribes that in the use of measures of force, the Council will recommend the forces which the members will furnish to protect the Covenant. Article 8 of the Draft Treaty provides that measures of force which states may apply are not taken to protect the Court Statute through any responsible body, but each state will consult its own interests and obligations.[16]

This transposal of the provisions of Article 16 raises certain questions which are not without point. For instance: (1) Will national laws which protect aliens within a country be automatically suspended as applying to the nationals of the aggressor state, or would some governmental act such as that by the U. S. Congress be necessary to make it effective? (2) In the event that a state took no action toward severing trade relations and preventing intercourse between the nationals of the aggressor state resident within its territory and the aggressor state, might citizens and organizations undertake this work of reprisal and in that event what would be the rights of such nationals under Federal laws as, for instance, in the United States? (3) In the event that certain states severed relations and others did not, what course would international business contracts take were they to involve the citizens of two states following opposed policies, with the nationals of an aggressor state? (4) Is it contemplated, when a state is declared to be an aggressor that diplomatic relations shall be severed? (5) In the event that mistakes were made in the zeal for reprisals against the business and property of nationals of an aggressor state, in what manner will restitution be made and before what courts? [17]

These are but some of the aspects of the problem. The International Blockade Committee which recommended nineteen interpretative

[16] Including alliances for defensive purposes to furnish mutual military assistance upon *apprehension of aggression.* (See Article 24 of the Draft Treaty; p. 768.)

[17] The attempt to attach penalties to the emigrants of a country presents difficulties to a country like the United States and illustrates the need of basic agreements upon fundamental questions. The conflicts between the laws of nationality are such that persons might be reckoned as of one nationality in one country and of a different nationality in another and what the law of the high seas is no one knows. Thousands of nationals of countries have become citizens of the United States but are still regarded under European law as nationals of their former countries. It is a pretty question for 13,000,000 aliens in the United States as to what their rights might or might not be in no court possessed of jurisdiction to decide the specific questions that might arise.

resolutions in the effort to make the economic penalty in Article 16 of the Covenant effective was in the end baffled by the elemental fact that the economic interests of states being competitive and not identical, any effective concerted economic reprisal was impossible and any separate action would prove ineffective. The nineteen resolutions have remained as a monument to the futility of economic reprisals against nations unless there exists a state of war in which such nations are directly engaged in their own interests.[18]

The gravity of the undertaking to apply economic sanctions, in the absence of any concerted and directed action on the part of signatory states, is increased by two other features of Article 8. It states that whenever a signatory is adjudged by the Court to be an aggressor, pursuant to the Draft Treaty, all protection of its business and property interests shall cease. It is conceivable that two states may have resorted to war, each in the belief that the other intended aggression and each acting in self-defense. Is then a state to be given no opportunity to comply with the verdict of the Court? And, if a state does so comply, in what manner may it be reinstated? In the first instance, no provision is made for delay in order that a state may indicate its desire to accept the verdict of the Court; in the second instance, no provision is made for the Court to ascertain the fact of its compliance and for its reinstatement. The only reference to these highly important matters appears to be in paragraph 3 wherein it states that the Court may fix the period during which any economic sanction may be *continued* at the request of any signatory.[19]

It is also germane to inquire whether under the Draft Treaty, the League of Nations is to have the enforcement of the sanctions. It will be recalled that the Court Statute made no provisions for sanctions on the theory that these were vested in the League and that it had authority to apply the sanctions contained in Articles 16 and 17 of the Covenant to any state not complying with the decision of the Court.[20] In the absence of any provisions for applying the economic sanctions which correspond to paragraph 1 of Article 16 of the Covenant or for *applying* measures of force as authorized in Article 24 of the Draft Treaty which correspond to paragraph 2 of Article 16 of the Covenant in principle, will the Council be within its authority, as set forth in the Covenant, if it undertakes to make recommendations to states as to the

[18] For discussion, see Chap. I; p. 18, but especially the *Records of the Second Assembly* containing the full discussion.

[19] The Treaty of Versailles covered these points in Articles 419-420 in relation to labor. (See page 730.)

[20] Chap. XXV; p. 488.

manner in which they shall apply such sanctions to the state adjudged to be an aggressor?

But the misgivings aroused by the Preamble that the Draft Treaty was intended to outlaw war, find root in paragraph 3 of Article 8 which states: "In the matter of measures of force to be taken, each signatory shall consult its own interests and obligations." It will be recalled that "measures of force," taken for any purpose other than defense or the protection of human life, constitute acts of aggression. But this paragraph indicates that when taken as sanctions they are legitimate. And not only are they legitimate to enforce the judgment of the Court, but states need consult only their own interests. It would therefore seem that war which is outlawed in one section of the Draft Treaty is thus recognized in another section as a legitimate penalty against the state so outlawed. This provision is not unlike in principle to Article 16 of the Covenant, wherein any state violating Articles 12, 13 and 15 of the Covenant is *ipso facto* regarded as having committed an act of war against all member states. But in that case the Council recommends the military force which states shall contribute to protect the Covenant; while under Article 8 states contribute no forces to enforce the decision of the Court but each may apply such measures as it sees fit in its own interests.[21] The use of a judicial decision to declare a state guilty of the crime of war, thus setting free other states to make war in reprisal in their own interests, appears to be not only a negation of the very principle of the outlawry of war,[22] but strikes at the integrity of juridical principles.

In the matter of sanctions, therefore, the Draft Treaty would seem to require amendment in that states adjudged aggressors should be permitted time wherein to comply with the judgment of the Court; that provision should be made for reinstatement: that the feasibility of economic sanctions be reconsidered in the light of the experience during the past five years with the application of Article 16 of the Covenant embodying similar provisions; and that the apparent incompatibility of the abolition of force and the use of force be harmonized.

THE COSTS OF WAR

Article 9 provides that any state, adjudged an aggressor by the Court, shall be liable to other High Contracting Parties for all costs resulting from aggression. This article does not specify that the Court is to

[21] This discussion should be read in connection with that on Articles 23-25 to which Article 8 may refer.

[22] The plan for outlawry of war is opposed to the use of force as a sanction. (See Chap. XXXIX; p. 792.)

examine the claims and fix the amount; it does not indicate the nature of the claims and whether they shall include both state and personal losses. It does not provide for any examination and verification of claims. While the principle of reparations may be sound, the absence of any safeguards does not seem calculated to induce many states to accept this Treaty.[23] Furthermore, no mention is made in this Treaty for the relinquishment of the spoils of aggression. A state may well afford to pay the costs of war if it is permitted to retain the territory gained.[24] It appears therefore that costs should be specified under precise regulations which will safeguard states against experiences encountered under similar vagaries in the Versailles Treaty.

PART II—DISARMAMENT

Articles 12-17, constituting Part II of the Draft Treaty, provide for disarmament, as follows:

"Article 12. The High Contracting Parties recognizing that excessive armaments constitute a menace of war mutually agree:

"(I) To limit or reduce their armaments to the basis necessary for the maintenance of peace and national security.

"(II) To study the ways and means for future reduction of armaments either as between all signatories or as between any two of them.[25]

"Article 13. In order to facilitate the security and progressive disarmament contemplated by the present treaty, any High Contracting Party may agree with one or more neighboring countries for the establishment of demilitarized zones.[26]

"Article 14. The High Contracting Parties will call a permanent advisory conference upon disarmament which shall meet not less than once every three years.

"This conference shall, in addition to its functions as described in Article 7, publish periodical reports concerning the actual conditions of the armaments of the signatory States.

"The conference shall advise the High Contracting Parties concerning measures to be taken to insure the carrying out of the principles of the

[23] See Chap. XXX; p. 582, for the experience of the German settlers in the matter of claims not fixed by the Court, and Chap. XXXII, p. 609, for the experience of France when damages were fixed by the Court.

[24] This is in disagreement with the plan for the outlawry of war which provides that an aggressor state shall give up the advantages acquired through illegal warfare and that all seizures and exactions, shall be null and void, in addition to the payment of costs.

[25] It has been the contention of supporters of the Borah Resolution, that the abolition of war would automatically reduce armaments through removing the menace of war; therefore, a joint scheme of outlawry and disarmament would seem to be in contradiction.

[26] The Treaty confers in this Article no powers not already possessed by states; and serves only to specify such zones as a method of facilitating progressive disarmament.

present treaty and it may prepare supplementary treaties for the establishment of demilitarized zones and for the further promotion of disarmament and peace.

"Article 15. The Advisory Conference upon disarmament shall appoint a Permanent Technical Committee.

"Article 16. The Permanent Advisory Conference or its Permanent Technical Committee shall give advice on technical questions to the Permanent Court of International Justice at the request of said Court.[27]

"Article 17. The expenses of the Permanent Advisory Conference and of its agencies shall be borne by the signatory powers in the proportions of their respective budgets for defense."

The essential principles of this scheme include: (1) that excessive armaments constitute a menace of peace; (2) that they should be reduced to a basis necessary to maintain peace and national security; (3) and that a study should be made of future reduction as between all signatories. It will be observed that the same quality of indefiniteness applies to these provisions as to those relating to the outlawry of war. What constitutes excessive armaments, and who shall determine what is necessary for the maintenance of peace and national security, is not specified. Nor do the succeeding articles contribute anything more specific. There is to be a Permanent Advisory Conference which shall meet not less than once every three years; which shall publish periodical reports; and which shall advise as to the measures to be taken to carry out the principles of the present Treaty for the further promotion of disarmament. It may also appoint a technical committee which shall give advice either to the Advisory Conference or to the Court.[27] There is therefore nothing in this particular section which does more than state a principle of reduction similar to that contained in Article 8 of the Covenant, and to provide means for study.

PART III—INTERNATIONAL INFORMATION

Were this the end of the Draft Treaty it would constitute a basis for discussion upon which common ground might be found as to definitions, the rights of states in domestic affairs, the codification of law, sanctions and the possible use of the Court of Justice as the tribunal to be granted jurisdiction. With the aim to study armaments and bring about a reduction there can be little disagreement, and the provision concerning demilitarized zones, although it implies the continuance of

[27] The International Labor Office sought similar powers in relation to labor, the principle being rejected at that time. (Chap. XXIV; p. 442.) It is evidently intended that this "technical commission shall be in most respects the same personnel as the League Commission," in order not to infringe upon the rights of the Assembly. (Prof. Shotwell, N. Y. *Times*, August 10th, 1924, p. 30.)

a war system, is not of a character to cause vigorous dissent. In the foregoing articles, there is no disclosed association with the League of Nations to arouse political discussion in the states concerned.

It is, however, in Parts III and IV that the real purpose of the Draft Treaty appears. They present an entirely different aspect of the Treaty, for they raise fundamental questions which certain states will desire to consider before passing upon its merits. Articles 18-22 provide as follows:

"Article 18. By the terms of Article 8 of the Covenant of the League of Nations:

" 'The members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programs and the condition of such of their industries as are adaptable to warlike purposes.'

"In order to facilitate the carrying out of the said engagement by the powers party thereto, the signatories hereto agree that there shall be maintained under the direction of the Council of the League of Nations a commission charged with the duty of making the necessary official examinations and reports.

"Article 19. The said commission shall proceed under such regulations as the Council of the League shall from time to time approve.

"Article 20. Subject to such regulations the members of the Commission shall be entitled, when they deem it desirable, to proceed to any point within the territory of any signatory or to send sub-commissions or to authorize one or more of their members so to proceed on behalf of the Commission.

"Article 21. The signatories hereto will give all necessary facilities to the said commission in the performance of its duties.

"Article 22. All reports made to the Council of the League by the said commission shall be communicated to the signatory powers."

What precisely are the obligations assumed by signatory states under these articles? (1) They agree to create a commission to inspect armaments and industries whenever the Council of the League so decides; (2) the Council appoints the Commission; (3) the Council makes the regulations and directs its work. *This Commission may proceed into the territory of any signatory state to investigate the scale of armaments, military programs and the condition of industries adaptable to warlike purposes,* in accordance with Article 20, wherein such signatories agree that the Commission shall be entitled so to do. Furthermore, in Article 21, signatory states agree to give the necessary facilities to the Commission within their territories.[28] This injection of

[28] The plan for the outlawry of war provides that all nations shall make public reports once a year, setting forth fully their military and naval armaments, structural and chemical. These reports are to be verified by authorized committees, acting under the direction and jurisdiction of an international court.

the Council into the scheme, with the right to make investigations in non-member states of the League is untenable for any state not bound by the Peace Treaties.[29] Incidentally, it is a right hitherto denied to the Council by its member states not so bound by these Treaties; for the most that has hitherto been granted has been the privilege of sending out questionnaires, which states answer or not as they may determine.[30]

From these provisions it therefore appears that the Draft Treaty is to be made a kind of vehicle by which Article 8 of the Covenant will be enforced; and, also, by which the Council will acquire the rights of investigation which states have hitherto been unwilling to grant.[31]

THE OPINIONS OF THE COUNCIL

These rights acquired by the Council, however, do not reveal their full significance until Articles 23-25 are considered in relation to them. They are as follows:

"Article 23. The Council of the League, taking into account the reports and opinions of the said commission, shall at any time when requested by any signatory hereto, consider summarily whether (a) the armaments of any signatory to this treaty are in excess of those fixed under its provisions; or (b) the military or other preparations of any State are of such a nature as to cause apprehension of aggression or an eventual outbreak of hostilities.[32]

"Article 24. If the Council shall upon such request be of the opinion that there is reasonable ground for thinking that a menace of aggression has arisen, the parties to the defensive agreements hereinafter mentioned

[29] See Chap. III; p. 64.

[30] For extent of replies, see Chap. XXXVI; p. 702.

[31] On this point, the report accompanying the Draft Treaty issued by the Foreign Policy Association states:

"In any case it is the opinion of highly qualified military experts in the United States that this country would have no objection to the adoption of the plan so earnestly advocated by Marshal Foch at the Peace Conference."

On the contrary, it would seem that this country would have every objection to a commission of the League of Nations investigating within its territory its military, naval and air program and the condition of its industries, adaptable to war-like purposes, which could be used by the Council in rendering an opinion for states to go to war against it under Article 25 of the Draft Treaty.

[32] These provisions repeat the error of the Treaty of Mutual Assistance by permitting the Council to offer an opinion concerning the military or other preparations of any state even when not signatory to the Treaty. The Permanent Court of International Justice in the matter of Eastern Carelia was of the opinion that a state could not be bound by a convention to which it was not a party. The Draft Treaty exercises due care in not bringing non-member states within the jurisdiction of the Court but Article 23 brings any state within the jurisdiction of the Council.

may put into immediate execution the plan of assistance which they have agreed upon.

"Article 25. If the Council shall, upon such request, not be of opinion that a menace of aggression has arisen, a public report to the effect shall be made and in such case no signatory shall be under any obligation to put into execution any plan of assistance to which it is a party; but any signatory, believing itself to be threatened with a menace of aggression, notwithstanding the fact that the Council of the League has not been of such opinion, may forthwith notify the Council to that effect, and such signatory shall thereupon have full liberty of action in military or other preparations for defense, subject, however, to the limitations as to armament which are imposed by any treaty then in force other than this Treaty and treaties dependent thereon."

With respect to these provisions the following observations are noted: (1) They establish the Council in competition with the Court of Justice, granting to it jurisdiction to render an opinion as to when military or other preparations constitute a menace of aggression. A reference to Article 6 indicates that the Court has jurisdiction upon complaint of any signatory to make a judgment that there has been a violation of international law under Article 4. But Article 23 grants to the Council the right to render an opinion upon precisely the same point, with this difference: When the Court renders a judgment it is not clear what is to happen next; but when the Council renders an opinion there is no doubt whatever—for the states having military defensive alliances may at once put their plans of assistance into effect. In other words, they may become the aggressors in order to forestall a menace of aggression, and thus begin war.

(2) It is here that the scheme of progressive disarmament is revealed. In Article 12, excessive armaments are stated to constitute a menace of war, to be limited to purposes of international peace and national defense. In Articles 18-22, the Council acquires the right of investigation of armaments and industries. But in Article 23, the reports of these investigations are to be used for what purpose? To assist the Court in rendering a judgment? To reduce armaments? Not at all, but as a basis for the Council to determine whether they are in excess of those fixed under the Draft Treaty, or to determine whether the armaments or preparations are of a nature to constitute a menace of war. And, if so, the Council will then authorize states to proceed to make war upon a menace of aggression, as revealed by the reports and opinions of these experts. It may be doubted whether any state will permit investigations which may be used by a political body to authorize states to make war.

It is also worth pointing out that an examination of Part II of the Treaty, relating to disarmament fails to disclose any authority or method for *fixing* armaments. It provides that signatories agree to reduce armaments to a basis necessary for the maintenance of peace and security and to study methods of future reduction. But the agreement of a state to so reduce armaments merely declares a principle, presumably leaving to states themselves the determination of what is necessary for their security. This does not *fix* armaments in accordance with any standard by which the Council could judge of the excess; nor is any intention revealed in Part II of conferring any such authority upon the Council, as is assumed by Article 23.

But the Council, in giving an opinion whether a state has exceeded the limit of armaments which it has set for itself as necessary to its security will take into consideration both the reports and the *opinions* of these commissions obtained from their investigations within the territories of signatories. Therefore, the Commission is a more important body than appears from Part II, as its opinions may constitute the ground upon which a state may begin a war. Article 23 makes this point explicit, for it provides that on the complaint of any signatory state the Council may also consider *summarily* whether the military or other preparations of *any state* (not necessarily signatory) are of a nature to cause apprehension of aggression or an *eventual* outbreak of hostilities.

This view is strengthened by the text of Article 24 wherein vague phrases are used. It states that whenever the Council, having taken into consideration these reports and opinions, *believes* there is reasonable ground for *thinking* there is a *menace of aggression,* it does not advise the party to resort to the Court under Article 4 as a state is required to do; but the Council itself authorizes parties to defensive agreements to put into execution immediately the plan of assistance which has been agreed upon. This means they may begin *defensive war* on the opinion of the Council that there is a *menace of aggression* as reported by the Council's commission.[33]

Further, Article 25 provides that in the event of disagreement between the Council and the parties to a defensive agreement, the Council holding there is no menace and the parties that there is a menace, the

[33] It has been shown repeatedly throughout these discussions that the Council has one invariable policy; not to permit any institution to be established which it does not control; and second to benefit by each question which comes within its purview. In this respect, this Draft Treaty is no exception. The Council retains rights which appear to belong to the Court and it would acquire benefits which its member states have hitherto withheld.

parties are not under obligations to put their plan of assistance into force but have full liberty of action in military preparations for defense upon notification to the Council. This is subject, however, to limitations of armaments imposed *by any treaty in force.*

It therefore appears that a state menaced by aggression need not proceed to the Court but instead may appear before the Council and obtain a sanction to begin a defensive war before an act of aggression has taken place and been proved before the Court of Justice. Then presumably, if the state it attacked defends itself, the suspicious state may complain to the Court that the object of its aggression was in reality the aggressor.

An examination of these provisions in relation to Article 4 of the Draft Treaty is not without interest. As an illustration, A, B and C are signatories to the Treaty, A has a defensive alliance with B and both suspect C of preparations for war, causing apprehension of aggression. A does not proceed before the Court as provided in Articles 4 and 6 for a judgment against C but instead appears before the Council. The Council examines the evidence which A submits, takes into consideration the reports and opinions of its commission and decides that there is reasonable ground for thinking such a menace exists (a judgment the Court is authorized to make under Article 6). Thereupon A and B put their plan of assistance into operation and begin war on C in so-called defense. But C resorts to the Court and accuses A and B of the crime of war and proves to the satisfaction of the Court that its own mobilization was a defense measure against another state, D, which is a non-signatory to the Treaty. The question arises: Does the appearance of A before the Council wherein it obtained the right to resort to war constitute a bar to its being brought into Court and adjudged guilty of the crime of war? In other words, in a statute which declares aggressive war to be a crime and the use of measures of force an act of aggression and preparations for aggression a violation of international law and which grants compulsory jurisdiction to a court to determine the same, what is the relation of that tribunal to the Council authorized to pass a political judgment upon the same question? And what is the position of the parties who initiate a defensive war which turns out to be an aggressive war, unprovoked and against an innocent state? Also will A and B be liable for costs under Article 9 for the damage done to C? [34]

It therefore appears that Part III is a kind of European rider attached to the American idea of the outlawry of war, intended to

[34] For hypothetical cases see Annex VII.

salvage the prestige of the League in the matter of disarmament, and to rescue the principles of the rejected treaties of mutual assistance. At the same time it is intended to grant to the Council an increase in power whereby it shares with the Court co-ordinate jurisdiction in determining when a menace of aggression exists.[35] That the act of war committed in apprehension of defense upon the territory of another state may be a negation of the very principle of the outlawry of war appears to have been a matter of no vital concern.

TREATIES OF MUTUAL ASSISTANCE

It is now of importance to examine the schemes of assistance which have been salvaged from the Treaty of Mutual Assistance and attached as a rider to the outlawry of war. The provisions are as follows:

"Article 26. The High Contracting Parties may conclude, either as between two of them or as between a larger number, agreements complementary to the present Treaty, exclusively for the purpose of their mutual defense and intended solely to facilitate the carrying out of the measures prescribed in this Treaty, determining in advance the assistance which they would give to each other in the event of any act of aggression.

"Such agreements may, if the High Contracting Parties interested so desire, be negotiated and concluded under the auspices of the League of Nations.

"Article 27. Complementary agreements, as defined in the preceding article, shall, before being registered, be examined by the Council with a view to deciding whether they are in accordance with the principles of this Treaty and of the Covenant.[36]

"In particular, the Council shall consider if the cases of aggression contemplated in these agreements are of a nature to give rise to an obligation to give assistance on the part of the other High Contracting Parties.

"The Council may, if necessary, suggest changes in the texts of the agreements submitted to it.

"When recognized, the agreements shall be registered in conformity with Article 18 of the Covenant. They shall be regarded as complementary to the present Treaty, and shall in no way limit the general obligations of the High Contracting Parties nor the sanctions contemplated against an aggressor under the terms of this Treaty.

"They will be open to any other High Contracting Party with the consent of the signatory States.

"Article 28. In all cases of aggression, for which provision is made in the agreement constituting a defensive group, the High Contracting Parties

[35] The question as to whether members of the League should resort first to the Council before proceeding to the Court is discussed in Chap. I; p. XXV, 464.

[36] The text and a full discussion of these treaties will be found in Chap. XXXVII; p. 733, and should be read in connection with the above. Great Britain has rejected the Treaty of Mutual Assistance on the ground (among others) that these treaties constitute a return to the system of alliances and balance of power which existed prior to the war.

which are members of such group may undertake to put into operation automatically the plan of assistance agreed upon between them; and in all other cases of aggression, or menace or danger of aggression, directly aimed at them, they will consult each other before taking action, and will inform the Council of the measures which they are contemplating." [37]

It is unnecessary to repeat here the objections raised to these treaties of assistance and discussed previously, except to point out that states subscribing to the outlawry of war may find themselves in the anomalous position of sanctioning military alliances to keep the peace when they become signatories to this Treaty; they may also find themselves sanctioning in principle the negotiations of such treaties under the League of Nations, whether or not they are members of that body; they may find themselves sanctioning the Council's examination of these Treaties; and they may find themselves sanctioning war whenever parties to these Treaties apprehend an aggression nowhere defined, or preparations for aggression nowhere specified; and under circumstances wherein the Council, not the Court, may determine the facts of a menace of aggression and authorize a state to begin war whenever it thinks it is the object of aggression.

It may be said that if the United States finds Parts III and IV objectionable by reason of their reference to the League, "that the verbal changes can easily be made by simply eliminating the United States from those articles of the Treaty which mentioned the Council or the League, or by accepting the position of mere associate." [38] This proposal is hardly tenable in view of the fact that no provision is made for partial adherence, but it may be presumed that if the United States may make reservations other states may also claim the right. [39] But Article 1 provides as follows: [40]

"Article 31. The present Treaty shall be ratified and the instruments of ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations.

[37] It will be observed that the provision of the Treaty of Mutual Assistance, which requires registration but not publicity of these military alliances, is here reproduced. Certain members of the League would therefore have knowledge of agreements to resort to war against certain states which information other states would not possess, a manifest inequality as among signatories to the Treaty.

[38] Pamphlet No. 28, Series 1923-24; Foreign Policy Association of New York.

[39] These provisions being a composite of Articles 18 and 19 of the Treaty of Mutual Assistance are subject to the analysis hereinbefore made of those provisions. See Chap. XXXVII; p. 742. It will also be observed that the Secretary-General of the League and not the Court of Justice is the repository for ratifications and withdrawals.

[40] Part V (Articles 29 and 30) provides that any state may adhere to the Treaty by depositing an act of adhesion with the Secretary-General of the League; and may withdraw in the same manner, such withdrawal to take effect within one year.

"It shall come into force:

"In Europe when it shall have been ratified by five European States, including France, Great Britain and Italy.

"In Asia when it shall have been ratified by two Asiatic States, one of which shall be Japan.

"In North America when ratified by the United States of America.

"In Central America and the West Indies when ratified by one State in the West Indies and two in Central America.

"In South America when ratified by four states in South America, one of which shall be either Argentina, Brazil or Chile.

"In Africa and Oceania when ratified by two States in Africa and Oceania.

"With regard to the High Contracting Parties which may subsequently ratify the Treaty, it will come into force at the date of the deposit of the instrument of ratification."

In view of the above contention, it is pertinent to inquire what kind of a treaty it would be if the first half was accepted by the United States and thus, in effect, on the North American continent; if the last half was accepted by France, Great Britain and Italy and thus, in effect, in Europe; and if the middle of it was accepted by Japan and Siam and thus in effect in Asia? The proposition that general treaties may be dismembered in any such manner or that states may become associates of treaties tends to break down the integrity of international obligations.

It would therefore seem that what has taken place in Parts III and IV is an undertaking to join the principles of the Treaty of Mutual Assistance, which the United States Government has rejected, to an immature program for the outlawry of war which the United States Government has not yet accepted, in the hope that the American idea will carry the European program of military assistance as a security against war.

THE AMERICAN AND LEAGUE PLANS

It has been said that the Draft Treaty represents the American movement to outlaw war and to encourage disarmament and is an effort to bring these movements into harmony with the European demand for security. With reference to disarmament it may be said that the vague provisions of Part II of the Draft Treaty bear little resemblance to the proposals at the Washington Conference which were explicit and bare of ambiguities.

With reference to the outlawry of war, as set forth in the American plan and in the League plan, the following table illustrates the divergencies in principle and procedure:

PRINCIPLES

PLAN FOR THE OUTLAWRY OF WAR	PLAN FOR DISARMAMENT AND SECURITY
The abolition of war as a means of settling disputes.	Authorized warfare under military alliances on apprehension of aggression.
War between nations declared to be a public crime under the law of nations.	War is an international crime.
Right of defense against actual invasion shall not be impaired.	Purposes of defense and protection of human life exempted.
All annexations, seizures or exactions by force, duress or fraud shall be null and void.	Costs resulting from aggression to be paid by the aggressor state; no provision for return of spoils of war.
Every nation should agree to punish its own international war-makers or instigators and war profiteers. This is a matter of local legislation.	No provision.
Governmental, domestic and protective policies to be exempt unless the parties have agreed otherwise by treaty.	All questions may be examined by the Court.
International laws of peace shall be based upon equality and justice between states and shall be expanded and adapted from time to time by similar conventions.	The power of victors over vanquished prevails in the Council which inherits authority under the Treaty.
All nations agree to abide in good faith to carry out the orders and judgments of the Court.	Economic penalties go into effect with judgment, to be applied or not by individual states; measures of force permitted, opinions of Council need not be respected when states differ from Council.
Submission of a code to referendum by people to pledge their faith.	Ratification by state governments of the draft treaty to be deposited with Secretary-General of League.

PROCEDURE

Declaration that war is a crime by passage of the Borah resolution in the Senate.	Declaration that war is a crime by the Draft Treaty of the League of Nations. Military alliances recognized and permitted.
When a responsible number of Parliaments have adopted similar resolutions a Conference to be called for a general treaty to outlaw war.	Discussion by members of the League of Nations.

PROCEDURE—(Continued)

Conference to call a convention for creation and codification of laws of peace to contain the foregoing principles.	Permanent Advisory Conference to meet from time to time to further codify law.
Judicial substitute for war created in an international Court modelled on the U. S. Federal Supreme Court.	Court of International Justice for judgments; League Council for opinions.
Such court to have affirmative jurisdiction to hear and decide all international controversies as defined by the code or arising under treaties.	Such Court and Council to have jurisdiction as defined by the Draft Treaty.
Such Court to have jurisdiction over all parties to a dispute upon the petition of any party or signatory nation.	All parties shall accept jurisdiction within four days or be deemed guilty of the allegations made against them.
All petitions, answers and other pleadings shall be in writing accessible to the public, and hearings by the Court to be open.	Present rules of Court Statute; provisions of military alliances to be registered with the League but not published.
Court shall sit in the hemisphere of contending nations and if in opposite hemispheres, in that of the defendant.	Court shall sit at The Hague.
All nations to make a public report once a year on armaments, to be verified by authorized committees acting under direction of the Court.	Investigation by Council into armaments of states, reports of its commissions to be used for opinions by Council. Technical committees established to advise Court.
After a code of law is created, submitted to a referendum, people of each civilized nation pledge their faith to its observance.	Ratification by specially selected states in each continent before becoming effective.
War must be outlawed before the Court is given obligatory jurisdiction over the disputes of nations.	Contemporaneous action.

From the foregoing comparison, certain differences in principle emerge: (1) The plan for outlawry of war deals with the pure principle of abolishing war; the plan for disarmament and security includes military alliances as a means of security with the outlawry of war. (2) The plan for outlawry of war specifies invasion as the cardinal principle; the disarmament plan contains no indication concerning the meaning of defensive warfare. (3) The outlawry plan requires the return of the spoils of illegal wars; the disarmament plan requires an

aggressor state to pay costs. (4) The outlawry plan proposes that states entering into an international agreement to abolish war agree to punish under national laws their own law makers; the disarmament plan is silent on this point. (5) The outlawry plan would exempt domestic governmental and protective questions; the disarmament plan includes every question. (6) The outlawry plan requires only the good faith of a state and its people as a sanction; the disarmament plan permits economic reprisal, measures of force, and military alliances. (7) The outlawry plan would have the people consider and pledge their faith; the disarmament plan would have it ratified only by the governments in power. (8) The outlawry plan requires international laws of peace based upon equality and justice between states; the disarmament plan permits the Council to direct its operation in the interests of a few powerful states. (9) The outlawry of war plan recognizes the abolition of war as a legal matter to be determined by a juridical body. The League disarmament plan recognizes it as partly legal and partly political, to be determined by both a judicial and a political body.

It is apparent also that the two plans differ in procedure, one requiring that the Congress and Parliaments shall act, that a conference of all states be called for the purpose of preparing a code of law containing the statute to outlaw war, and that it shall be adopted by the people before the Court is given jurisdiction. The other plan requires that a few persons prepare a plan which the states of the League pass upon for others to adopt later if they will.

THE COVENANT AND THE TREATY

The granting of certain powers to the Council under this Draft Treaty; the competition between the Court rendering judgments and the Council rendering opinions; the authorization of recognized alliances for defense in which plans for war are specified, lead to the question as to what may be the future relationship between the Covenant and the Draft Treaty. The Covenant recognizes war as a legal institution; and it authorizes member states when negotiation and mediation fail, to resort to war. The Council itself may recommend military measures to protect the Covenant. None of these provisions is repealed and Article 20 of the Covenant states that all agreements, inconsistent with the terms of the Covenant, are abrogated and that states will enter into no such agreements. Manifestly, war cannot be authorized under one set of conditions in the Covenant and abrogated under a different

set of conditions under the Draft Treaty by the same Council. Senator Borah pointed out this vital discrepancy as follows:[41]

"How utterly vain are all schemes for peace not based upon the principle that war is a crime and its fomenters to be dealt with as criminals, may be illustrated by what has taken place since the organization of the League of Nations. Every war of invasion, every invasion of territory, since the League was created has been by a member of the League. Every move for disarmament has been opposed by a member of the League. Every military alliance since the Treaty of Versailles has been initiated by a member of the League. It was a League member which incited Greece to war and then deserted her in her humiliation and defeat. It was a League member which armed and financed Turkey and brought her back into power. The army which butchered helpless and defenseless women and children on that field of carnage in Asia Minor was armed and equipped by a member of the League of Nations. The three invasions of Russia were equipped and munitioned by members of the League of Nations. The Serb-Croat-Slovene state began war on Albania. Albania appealed to the League, the League evaded the issue, and the war continued between the two members of the League. The Italian Fascisti, under D'Anñunzio, began war on and captured Fiume. Italy was a member of the League and of the Council at the time. Italy later expelled D'Anñunzio but kept Fiume. Greece was a member of the League when she invaded Asia Minor. Poland, a member of the League, invaded and took Vilna and began war on Lithuania. Poland, a member of the League, used arms against Eastern Galicia. France, a member of the League, invaded the Ruhr. * * *

"When the sentiment of mankind has been taught to look upon war as a crime and when that sentiment has been crystallized into international law and to be construed by an independent international judicial tribunal, the world will be near to universal peace."

The tendency of the League to consider parallel schemes to the Covenant, without being concerned whether they square with the principles of the Covenant, whether they, in fact, constitute an abrogation or amendment of its terms, and to grant to the Council powers not authorized by the terms of the Covenant which created it, is again apparent in this proposal as it was in the Treaty of Mutual Assistance. It raises the grave question whether a political body charged with the duties of executing peace treaties based upon the war system is the best body to draft a code of international law, outlawing the war system. It raises also the question whether an undertaking to outlaw war is not premature until some one or more of the responsible states have examined or conferred together on the proposal. In any event, the consideration of the question by the League serves to stimulate international discus-

[41] *New Republic,* July 9th, 1924.

sion of the question of the outlawry of war, which service its adherents will doubtless appreciate.

THE UNITED STATES AND THE SCHEME

The value of this plan to Europe rests primarily upon the attitude taken by the United States Government toward it and it would be a grave injustice to European people were they led to believe that it represents either the outlawry of war movement in the United States or that this Government is in favor of it. European peoples have been repeatedly misled by Americans who have undertaken (without power) to speak for the United States' foreign policy. This misconception should not be extended by the League's promulgation of a plan put forward by a group of its adherents, who were for the most part identified with the promotion of the Versailles Treaty, which this country has rejected. European states, notably France, have begun to ask to what extent the United States Government would co-operate in the application of economic sanctions; to what extent it would co-operate in permanently disarming Germany; whether the United States would take part in the League inspections of armaments; and if it would be involved in the results of inquiries in which it took no part.[42] These are points where the role of private citizens ends.

To these questions it may be answered that the United States Government has not considered the plan and there is nothing in its present policy to indicate support of this Draft Treaty, aligned as it is with the League and dividing the authority between the Court and the Council. Neither has this plan received the endorsement of American public opinion, which is united behind the Borah Resolution. Under these circumstances, it may be found that the Fifth Assembly will revise this scheme in accordance with its plans for security and disarmament and that it will then reappear for American endorsement in much the same condition as the Fourteen Points after the Peace Conference had adapted them to its requirements.

[42] *N. Y. Times,* August 12, 1924.

CHAPTER XXXIX

THE OUTLAWRY OF WAR

The record set forth in the foregoing discussion concerning the settlement of disputes, permits of at least four irrefutable deductions: (1) That the war system and use of force to settle disputes is the basis of security in Europe; (2) that there is a blockade of justice, expressed best in the words of Lord Hugh Cecil: "The nations care everything for peace and nothing for justice"; (3) that nations are obsessed by the idea that the future guarantee of security lies in disarmament; and (4) that the restoration of defensive military alliances is indicative of a belief that war is imminent.

There is nothing to indicate that there is any relief in sight for people from the intolerable burdens of fear for their safety and from the taxation and debt which weigh them down in their efforts to insure safety by preparations for war. Already the shifting of positions by states for alignment in the next war has begun. Racial, economic and geographical elements are reasserting themselves. No one can observe the formation of defensive alliances, the knitting together of financial and commercial interests among countries, without appreciating their military significance. Within the League of Nations, Great Britain alone withstands these new tendencies and without the League, Russia is strengthening itself to the north and east and south by agreements in order that it may be free to act upon its western front.

Against these visible signs of apprehension of war what securities are being erected? Naval and military armaments, treaties of mutual military assistance, inventions and investigations, proposed demilitarized zones—these are the weapons with which states plan to meet the warfare of the future. But powers of destruction, concealed in laboratories, the products of which will come through the air, by streams and rivers or through the trees, invisible in their bacteriological and chemical properties, are to be met by none of these contrivances for defense. There is no defense against future methods of destruction which science cannot outstrip; for the old mechanics of war are no defense against the new chemistry of war.

What is it men have always done when evils become a menace and when they do not yield to regulation? When duelling took as its toll too many of the leading men of a nation it was outlawed. When slavery became a menace to society it was outlawed. And in the United

States when the saloon, as the center of vice and corruption, defied regulation, it was abolished. The Americans, reasoning from these and other precedents, have reached the conclusion, with the advent of destructive science, which is no respecter of persons nor of territories, nor of non-combatants, nor of neutrals, and which makes no distinction between men, women and children, in its death dealing, that war has reached the point where it too must be abolished.

This conclusion is inherent in American character and tradition. What it cannot regulate, it abolishes. The evils of the saloon have called forth from this people a drastic method, namely prohibition, but the moral force of the people is behind the remedy. The evils of war call for a no less drastic remedy, and the moral force of the American people is behind that remedy. It is their conviction that war must be abolished, clinched by its experience in the Great War followed by other wars and by the application of force to the settlement of disputes. This disillusion has made this country irresponsive to the petty steps which have been proposed to it, and which are based upon a militaristic system of society. It is the growth of the movement in the United States to abolish war which has led the League of Nations to tamper with the idea and to seek to harmonize the will to outlaw war in the United States with the craving for national securiy in Europe. Out of the tampering may come some good, even though the day be still distant. It is the purpose of this chapter to present the American plan, in so far as it has been formulated by its originators,[1] and as presented to the United States Senate.[2]

PRINCIPLES OF OUTLAWRY OF WAR

The following are the essential principles of the American plan to abolish war:[3]

[1] The originators of the American plan are the Hon. S. O. Levinson, Senator William E. Borah, Col. Raymond Robins, Prof. John Dewey, Rev. John Haynes Holmes, J. Reuben Clark, Jr., Judge Florence E. Allen and the late Senator Philander C. Knox. The American Committee for the Outlawry of War, of which the Hon. Mr. Levinson is chairman, is the official organization of the movement, with headquarters in Chicago.

[2] This movement has been endorsed by hundreds of organizations and individuals of prominence and competence. As indicating the character of the former, the following may be mentioned: The Presbyterian General Assembly, the Methodist General Conference, the Pacific Coast Unitarian Conference, the Canadian Presbytery, the National Lutheran Assembly, the National League of Woman Voters, National Education Assn., and the Women's Trade Union League.

[3] As drafted by the Chairman of the American Committee for the Outlawry of War, Hon. S. O. Levinson, August, 1924.

(1) The further use of war as an institution for the settlement of international disputes shall be abolished.

(2) War between nations shall be declared to be a public crime under the law of nations, but the right of defense against actual invasion shall not be impaired.

(3) All annexations, seizures, or exactions by force, duress or fraud, shall be null and void.

(4) The international laws of peace shall be based upon equality and justice between nations, and shall be expanded, adapted and brought down to date from time to time by similar Conventions.

(5) A judicial substitute for war as the method of settling international disputes shall be created (or if existing in part, adapted and adjusted), in the nature of an international court modeled on our Federal Supreme Court in its jurisdiction over controversies between our sovereign states; such court to possess affirmative jurisdiction to hear and decide all international controversies, as defined by the code, or arising under treaties.

(6) The jurisdiction of the court shall not extend to matters of governmental, domestic or protective policy, unless one of the disputing parties has by treaty or otherwise given another country a claim that involves these subjects. The classes of disputes excluded from the jurisdiction of the international court shall be specifically enumerated in the code and not be left open to the flexible and dangerous distinction between justiciable and non-justiciable controversies, including questions of national honor.[4]

(7) War must be outlawed before the international court is given affirmative jurisdiction over the disputes of the nations, just as the power to engage in war among our states was, under Article 1, Section 9 of our Constitution, given up by our states before they clothed the Supreme Court with jurisdiction over their disputes.

(8) National armaments to be reduced to the lowest point consistent with domestic safety and reasonable international requirements.

(9) All nations shall make public report once each year, setting forth fully their armaments, old and new, military and naval, structural and chemical. These reports to be verified by authorized committees acting under the direction and jurisdiction of the international court.

(10) Every nation should by agreement or treaty bind itself to indict and punish its own international war breeders or instigators and war profiteers under powers similar to those conferred upon our Congress under Article 1, Section 8, of our Federal Constitution, which clothes Congress with the power 'to define and punish offenses against the law of nations.' Provisions for adequate legislation to this end should be made.

The principles set forth may be summarized as follows: (1) The use of war to settle disputes shall be abolished: it may be used only

[4] For the United States, these exemptions were to include policies involved in the Monroe Doctrine, conservation, immigration, right to expel aliens, tariff, right to maintain military establishments, coaling stations, other means of self-defense, fortification of the Panama Canal and frontiers and right to discriminate between natives and foreigners with regard to citizenship, property rights and other matters of a like character.

to repel invasions. (2) Territorial and other benefits from war are to be forfeited. (3) International law of peace is to be codified on a basis of equality and justice between nations. (4) An international court is to have jurisdiction over controversies between sovereign states; the court to have affirmative jurisdiction and decide all controversies as defined by a code of law or arising under treaties. (5) War is to be outlawed before a court is given such jurisdiction. (6) The jurisdiction of the Court is not to extend to domestic affairs or to the governmental or protective policy of a state unless by treaty it is so included. (7) National armaments are to be reduced to a point consistent with domestic safety and international requirements. (8) Nations are to make a public annual report on armaments, to be verified by authorized committees, acting under the direction of the court.[5] Concerning these principles certain questions have been raised; among which the following are noted:

Only wars of aggression are outlawed. Inasmuch as defensive wars are recognized to be legal, may not a belligerent nation claim to be fighting in self defense? In answer to this objection it has been pointed out that self defense of a nation does not constitute war any more than self defense constitutes murder; and that actual attack or invasion is made the test of the right of a state to defense. Territorial integrity is thereby preserved. It may also be noted that under this plan, a state attacked, while defending itself, may file a petition in a court and obtain a juridical opinion upon the merits of the controversy. As matters now stand, states alone are the judges of whether their acts of aggression are in consonance with international law, and whether such acts are defensive or aggressive. Under these conditions, other states are loath to express an opinion or take action involving responsibility. It is to be presumed that, inasmuch as the plan for outlawry of war calls for a code of law embracing these provisions, that the conference which formulates the convention will have in mind a demarkation line between defensive and aggressive warfare to guide the Court in its determination of the commission of a crime; and that the law alleged to be broken will be specific. Otherwise, the indefiniteness of the League proposals will be repeated.

Revolutions are resorts to war and may be affected by this proposal. Inasmuch as a revolution is ordinarily a peoples' right to self defense against their government or any form of oppression, it is held that such movements would not come within the purview of this proposal.

[5] For statements of the Permanent Advisory Commission on this subject, see Chap. XXXVI; p. 690.

Furthermore, it is pointed out that responsible states have national laws adequate to punish these domestic uprisings; also that if invasion be made the test of the crime of war, that question cannot arise among people of the same country. In view, however, of the possible revolt of minorities under the governments of Central Europe, it might be well for those charged with the drafting of the convention to guard, by specific exemptions, against a possible design on the part of such states to charge these minorities with the crime of war under the proposed convention.

How may territorial inequities be rectified without resort to war, invasion being essential to such rectification? It is probable that certain European countries would be unwilling to enter into any undertaking which further establishes or complements the Versailles Treaty as the final word on boundary lines; it is also probable that certain other countries which possess present advantages will be unwilling to consent to any change. Unless each group is willing to make some concessions, the abolition of war is impossible. These concessions may well be in the nature of an annex to the convention for the outlawry of war, which annex will lay down the conditions under which states may appeal to the court for a rectification of boundaries based upon ethnographic, economic and geographical grounds; and the conditions under which plebiscites shall be considered as a remedy. In the event that negotiations between states fail to bring relief, resort might be had to the court for a hearing in which case it would apply the principles laid down in the annex.

How may a state collect reparations or debts from an outlaw state? On the question of the recovery of contract debts, the Hague Conference of 1907 adopted a convention declaring against the use of force in the recovery of contract debts in which it was agreed, as follows:[6]

"Article 1. The contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country, as being due to its nationals. This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or after accepting the offer, prevents any *compromis* from being agreed on or after the arbitration fails to submit to the award."

It is probable that nations which might otherwise consider the principles of the outlawry of war would be unwilling to do so if it meant relinquishing their claim to reparations and the right to use

[6] Proceedings of the Hague Peace Conference, 1907, Vol. I; p. 616.

force in their collection. The precedent established for contract debts, suggests the possibility of an annex to the outlawry of war convention, in which annex the recovery of reparations by force, including the occupation of territory would be prohibited and provision made for submitting the matter to the court in accordance with the legal principles which were found to be applicable to the subject of reparations.

With respect to such questions, the Hon. J. Reuben Clark, Jr., makes the following suggestion in his plan to outlaw war:[7]

I. A convention (treaty) * * * might require the offending nation to make for its illegal action any or all of the following restitutions, restorations, and guarantees:

(a) To give up any and all advantages, whatever their nature or character, which it had secured through its illegal acts.

(b) To restore completely any and all property taken or destroyed in the course or as the result of its illegal acts.

(c) To pay the cost of all operations of whatever kind which were incident to the defensive or other measures taken by the other nations.

(d) To reimburse the nation attacked for all expenditures incurred by it in defending itself against the aggression of the offending state.

(e) To surrender for a period of years to be determined by the World Congress, such and so many of its customs houses as might be determined by the Congress which should provide a system for administering the same during the periods named and which should apply the proceeds thereof to the purposes enumerated under (b) (c) and (d) hereof, unless sums sufficient therefor should be earlier paid by the offending state from other sources.

(f) To pay as a penalizing indemnity such sums as the World Congress might determine. This indemnity might be used for the development, particularly the building of lines of communication, of such of the poorer nations as might be designated by the World Congress.

(g) To have applied against it, in cases of great gravity where the laws of war had been broken, the doctrines of retorsion and reprisal, the World Congress determining the extent to which these doctrines should be applied.

(h) To deliver to the World Congress for trial and punishment, those of its authorities who were responsible for the hostile acts.

"But the Convention should further provide that war waged as an act of self-defense upon attack, or as an act of self-preservation either prior to attack, or otherwise, or as a means of compelling an aggressive belligerent to desist, shall be justifiable and shall not entail the punishment hereinabove provided for.

"Intervention pursuant to the terms of a treaty obligation or right, and interposition for the protection of oppressed citizens and their rights shall not be regarded as war within the meaning of the Convention.

"The Convention should make provision for determining the aggressor,

[7] "The Pacific Settlement of International Disputes," *Unity*, October 4th, 1923.

in case of threatened or actual international war (it might be done by the World Congress); and it must be considered whether it ought not also to make provision for concerting (when deemed desirable or necessary) common measures of defense or control by the defending or non-aggressive nation or nations against the aggressors, and for cumulative measures of pressure and restraint which the nations might use in their discretion to avert a threatened war.

A thorough study of the whole question of reparations, as it has been applied in the past, with a view to suggesting legal principles which would insure payment and at the same time recognize state sovereignty and remove the recovery of reparations as a menace of future wars is highly necessary as an antecedent to the formulation of a convention to outlaw war.

Is the provision feasible that states shall agree to punish their own international war breeders or instigators or profiteers? To the United States this principle may present less difficulty than to European states.[8] The definition of a *war breeder* presents certain difficulties. Would, for instance, an organization, within a state such as Poland, which reported and carried on activities to secure relief for German settlers, be held to be an instigator of war, and might not such national laws be framed in a manner to suppress all efforts on behalf of minorities? Again, might not protests against the provisions of the Treaty of Versailles (as in the Saar) be held to be in violation of such a national law? In the event, for instance, that such a law was passed in Belgium, might it not estop the residents of Eupen and Malmedy from seeking relief by legal means from their incorporation in Belgium, on the ground that it fomented war between Belgium and Germany?[9] In Europe, such laws might lend themselves to the oppression of minorities and to closing all avenues of their appeal to public sympathy—a contingency not contemplated by the American proposal.

Who is to determine what armaments are consistent with domestic safety and international requirements? Presumably, it is the intention of the originators of the idea that a state is the best judge of its own requirements. This view is supported by the provision that states are required only to make annually a public report as to the state of

[8] Viscount Cecil's objection to this proposal was to the effect that if a people follows its responsible leaders into war it cannot be expected to punish them either immediately or subsequently. *(Notes on the Outlawry of War.)*

[9] In the event that the nationals of a country were being persecuted in another country the question of what aid the nationals of the former country might give to their friends and relations, thus persecuted, is of considerable importance if they may be held liable under a national law to the charge of being war instigators.

their armaments. It is the contention of certain of the supporters of this proposal that armaments will regulate themselves once the menace of war is removed; while others hold that the principle of reduction is essential. The use of the phrase "reasonable international requirements," however, lends color to the idea that there is to be an international use of armaments. If so, it is not clearly provided for elsewhere in the procedure. In any event, the fate of the Treaty of Mutual Assistance, which undertook to centralize international forces under the League, indicates that states intend to retain full sovereignty over their forces of defense.

There is one other provision which indicates somewhat of confusion in the plan to outlaw war, namely, that states should make reports on armaments verifiable by the court of jurisdiction. It may be questioned (1) whether such reports will be of value; (2) whether it is possible to verify them by any central body, that function requiring the interjection within the territory of states of a foreign body, which would be an infringement upon state sovereignty; and (3) whether a judicial body, such as is here contemplated, should be burdened with what must appear to some states to be a political matter. As the discussion progresses, it seems probable that all matters referring to armaments may be eliminated as not being essential matters for regulation in a scheme to outlaw war.

PROCEDURE

The matter of procedure becomes highly important, in a proposal which reverses the viewpoint concerning war and which postulates its theory upon its abolition and consequently upon the revision, if not abrogation, of existing international law and agreements which recognize and regulate warfare. These rules are set forth by the originators of the plan, as follows:[10]

1. Declaration of our international policy by the passage by the United States Senate of the pending resolution to outlaw war; to be followed by similar parliamentary declarations in other countries.

2. When a substantial number of parliaments have so responded, conference of all civilized nations to be called to execute a general treaty for the abolition and outlawing of war.

3. This Conference to call a Convention for the creation and codification of the international laws of peace at which all civilized nations shall have adequate representations.

[10] As drafted by the Chairman of the American Committee for the Outlawry of War, the Hon. S. O. Levinson.

4. After the code has been created, it shall be submitted to a plebiscite or referendum in each civilized nation, so that the faith of the peoples of all countries shall be pledged behind the code.

5. The court shall have jurisdiction over all parties to a dispute upon the petition of any party to the dispute or of any signatory nation.

6. All petitions, answers, and other pleadings, shall be in writing and accessible to the public, and all hearings by the court shall be open.

7. The court should sit in the hemisphere of the contending nations; and if the disputants live in opposite hemispheres, then in the hemisphere of the defendant nation.

8. All nations shall agree to abide and be bound by and in good faith to carry out the orders, judgments, decrees, and decisions of such court.

It will be observed that the successive steps are as follows: (1) The official declaration of the United States Government in favor of the proposal; (2) the adoption of the proposal by the Parliaments of other countries; (3) a conference to create and codify international law in which all nations shall be represented; (4) submission of the code containing the outlawry of war convention to a plebiscite; (5) after its adoption by states, the creation of a court with affirmative jurisdiction (as set forth in item 5 of the principles); (6) all petitions and pleadings to be in writing and hearings by the court to be public; (7) the court to sit in the hemisphere of the defendant nation; and (8) the sanctions to be those of good faith.

It is apparent that for such a procedure there is required first a broad educational basis among the people of various countries concerning war and its abolition. On this point Col. Raymond Robins, the leading American advocate of the plan states:

"First. Work to create an informed and definite public opinion in America and throughout the world demanding the outlawry of the war system in all lands. * * *

"Second. Bring this informed and definite public opinion for the outlawry program to bear upon those officials with power in all governments; * * * demanding the calling of an international conference to provide and submit to the people of every nation for ratification:

"1. A mutual treaty outlawing the war system and making war a crime under the law of nations. * * *

"2. An international code for the legal settlement of all disputes between nations based on the principle of equality in justice and right between all peoples, great and small.

"3. A statute providing an international tribunal with affirmative jurisdiction to hear and determine all disputes arising between the nations in accordance with such international code."

THE BORAH RESOLUTION

The first step in this procedure was taken when Senator Borah, on December 20th, 1922, introduced a resolution embodying the principle of the outlawry of war.[11] The resolution reads as follows:

Whereas war is the greatest existing menace to society, and has become so expensive and destructive that it not only causes the stupendous burdens of taxation now afflicting our people but threatens to engulf and destroy civilization; and

Whereas civilization has been marked in its upward trend out of barbarism into its present condition by the development of law and courts to supplant methods of violence and force; and

Whereas the genius of civilization has discovered but two methods of compelling the settlement of human disputes, namely, law and war, and therefore, in any plan for the compulsory settlement of international controversies, we must choose between war on the one hand and the process of law on the other; and

Whereas war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and be strictly within its legal rights; and

Whereas revolutionary wars or wars of liberation are illegal and criminal, to wit: high treason, whereas under existing international law, wars of aggression between nations are perfectly lawful; and

Whereas the overwhelming moral sentiment of civilized people everywhere is against the cruel and destructive institution of war; and

Whereas all alliances, leagues, or plans which rely upon force as the ultimate power for the enforcement of peace carry the seeds either of their own destruction or of military dominancy to the utter subversion of liberty and justice; and

Whereas we must recognize the fact that resolutions and treaties outlawing certain methods of killing will not be effective so long as war itself remains lawful; and that in international relations we must have, not rules and regulations of war, but organic laws against war; and

Whereas in our Constitutional Convention in 1787 it was successfully contended by Madison and Hamilton that the use of force when applied to people collectively—that is, to States or nations—was unsound in principle and would be tantamount to a declaration of war; and

Whereas we have in our Federal Supreme Court a practical and effective model for a real international court, as it has specific jurisdiction to hear and decide controversies between our sovereign States; and

Whereas our Supreme Court has exercised this jurisdiction, without resort to force, for 135 years, during which time scores of controversies have been judicially and peaceably settled that might otherwise have led to war between the States, and thus furnishes a practical exemplar for the compulsory and pacific settlement of international controversies

Whereas an international arrangement of such judicial character would

[11] Senate Resolution No. 101, 67th Congress, 4th Session.

not shackle the independence or impair the sovereignty of any nation; now, therefore, be it

Resolved, That it is the view of the Senate of the United States that war between nations should be outlawed as an institution or means for the settlement of international controversies, by making it a public crime under the law of nations, and that every nation should be encouraged by solemn agreement or treaty to bind itself to indict and punish its own international war breeders or instigators and war profiteers under powers similar to those conferred upon our Congress under Article I, Section 8, of our Federal Constitution which clothes the Congress with the power "to define and punish offenses against the law of nations"; and be it

Resolved further, That a code of international law of peace based upon equality and justice between nations, amplified and expanded and adapted and brought down to date, should be created and adopted;

Second. That a judicial substitute for war should be created (or, if existing in part, adapted and adjusted) in the form or nature of an international court, modeled on our Federal Supreme Court in its jurisdiction over controversies between our sovereign States, such court to possess affirmative jurisdiction to hear and decide all purely international controversies, as defined by the code, or arising under treaties, and to have the same power for the enforcement of its decrees as our Federal Supreme Court, namely, the respect of all enlightened nations for judgments resting upon open and fair investigations and impartial decisions and the compelling power of enlightened public opinion.

This resolution has been referred to the Committee on Foreign Relations and has not been reported to the Senate for discussion, its proponents believing that the people of the United States should first understand and endorse the proposal.

THE INTERNATIONAL CONFERENCE

Among those who have endorsed the idea in principle there is dissension as to the body to be charged with the important task of formulating the code of law and the conventions thereunder. One group believes that the League of Nations should be charged with the duty and responsibility of reducing these principles to a practical code of law and procedure. Another group believes that it should be the Hague Organization. The first group bases its claim upon Article 10 of the Covenant which it states prohibits aggression;[12] that the League has established the machinery for peace to which states submit their disputes; and that states have already assumed obligations under the

[12] On this point Viscount Cecil said: "It is only right to recognize that conquest and the violation of political independence of other states have both been forbidden by the much misunderstood Article 10 of the Covenant." *(Notes on the Outlawry of War.)*

Covenant which constitute steps in the direction of outlawry of war.[13] The second group bases its claim upon the Hague Conferences of which all civilized states are members; that the United States will not consent to enter the League; and that the League, having rejected the plan to codify international law and having failed to prevent aggression, has not established its claim to the right to undertake this program. Whatever may be the merits of these two contentions, the fact remains that American affiliation with the League has been rejected and at present constitutes a bar to the United States considering any political plans which are before the League. Therefore, it may be assumed that the movement for the outlawry of war must first be considered by the United States Government, if the participation of this country is desired.

Hon. J. Reuben Clark, Jr., the leader in the movement to resort to The Hague Organization, suggests that a world juridical system be created, consisting of three classes of courts, namely, The Hague Court, courts of original jurisdiction, and a supreme court with obligatory jurisdiction to be granted to the two latter. On behalf of the plan, he writes:[14]

"1. Build up The Hague Tribunal, which is an already existing and accepted institution to which all the nations of the earth (not a part of them only) are now or may become parties, and to which a great majority of the nations have consented and to whose functions they are accustomed.

"2. Establish a world judicial system under conditions involving no new instrumentalities for the creation of the system,—The Hague Tribunal groups already function in creating the League Court.

"3. Involve no new principle in the election of the judges of the proposed Supreme Court,—the judges of the League Court are now elected by representatives of the nations (in the Council and the Assembly), and this suggestion is to have them elected by the representatives of the nations assembled in The Hague Tribunal.

"4. Bring international justice to the doors of the component national units by providing for local courts of first instance from which appeals may, in necessary cases, be taken to the Supreme Court (as in the American judicial system).

"5. Make the initial trial of international disputes less expensive than the trial thereof before the Supreme Court in Europe. At present a small nation can fight a decisive battle for what it costs to try its disputes in Europe.

"6. Provide a real compulsory (affirmative) jurisdiction in at least a part

[13] See Chap. XXXVIII; p. 752, for analysis of the project now before the League of Nations, as prepared by the League group of Americans.

[14] "The Pacific Settlement of International Disputes," *Unity*, October 4th, 1924.

of the field of international relationships, instead of the weak and ineffective jurisdiction of the League Court, which has been strangled by the Powers and not permitted to function upon any important controversy.

"7. Preserve the great provisions of The Hague Convention relating to Good Offices and Mediation and to Commissions of Inquiry.

"8. Give to The Hague Tribunal certain deliberative, quasi-legislative functions which can serve as a safety valve for and a crystallizer of world opinion and as a formulator of desirable actions and policies, but without any sanction except the power to recommend,—thus securing in these respects all the advantages of the League Assembly without any of the disadvantages arising from the domination of the League Council and of the Council of Ambassadors.

"9. Create a real judicial system with the minimum amount of innovation upon existing, accepted instrumentalities, and at the same time separate that judicial system from international political influences.

"10. Eliminate entirely all connection with the League and with any and all of its instrumentalities, and thus eliminate all bases of criticism founded upon unwillingness to become affiliated with the League.

"11. Eliminate all possibility of envolvement in League matters, commitment to League policies, connection with the enforcement of the iniquitous, peace-destroying war treaties, and participation in the enforcement of the League sanctions in arbitral matters.

"12. Provide a system of world association which shall in no way sacrifice our own interest, our free institutions, or our sovereignty."

SANCTIONS

The American plan to outlaw war follows the traditional arbitral policy of the country in that it relies wholly upon the sanctions of good faith. This proposal is likely to constitute a very real stumbling block to countries in Europe, now menaced by war, which are seeking defensive military alliances as a means of security. They believe, as a result of their experience under Article 10, that any sanctions but military are likely to prove useless. But it may be pointed out that no military alliance is likely to prove effective against chemical and bacteriological warfare to be let loose in the future in insidious ways which no military preparedness can forestall. The secrets of the laboratory may be counteracted only when their deadly work is performed. Furthermore, any proposal which recognizes or furthers military alliances as sanctions is not likely to receive American support. It would appear also that no real thought has been expended upon sanctions other than military, as is indicated by the imperfect character of Article 16 of the Covenant. If, as the American plan proposes, good faith is made the basis of the sanctions, it is conceivable that upon it might be built an affirmative policy of assistance to an

aggressed state rather than a negative policy against an aggressor state which has been found to be impracticable, due to the reluctance of states to take action *against* a state. It is possible, therefore, to consider an annex to the convention on the outlawry of war, providing for affirmative financial and economic assistance to aggressed states, when adjudged to be such by the Court, under a plan to be administered under its decree. This might take the form of loans and supplies and reconstruction and other assistance; or that states would agree not to recognize the annexations of territory acquired by the aggressor state, in the event that the aggressor state refused to accept the verdict of the court. The question whether military assistance might be furnished to a state to be used solely for the purpose of repelling invasions should be fully discussed, especially whether such intervention on the part of states desiring to aid the state which is the object of aggression should be permitted other than by application to and approval by the Court after the state has set forth its reasons for desiring to intervene and the manner and extent of its proposed participation. If, therefore, outlawry of war is to receive serious consideration in Europe under present conditions of insecurity, with good faith as the sole sanction, an annex providing for economic, financial and other assistance to aggressed states is an essential part of such discussion.

THE CODIFICATION OF LAW

The plan for the outlawry of war lays down the principle that a judicial substitute for war shall be created to administer the code of law which is recommended; and that it shall be modelled upon the principle of the United States Supreme Court. While there is substantial agreement upon this principle, there is not unanimity as to the best methods of putting it into practice. There is agreement only in that all states should be included in whatever conference considers the foregoing principle as a basis of peace; and that the principle should be embodied in a general treaty.

The first question arises over the organization which shall sponsor international discussion of these principles. The adherents of the League of Nations believe that the League should be the agency to call a conference, propose the Treaty and submit it to the various states. To this proposal, objection is made that certain indispensable states, among them the United States, the home of the idea, are not members of the League and until such states accept membership, it is impossible for the League to bring about such an agreement. The opposition in the United States to joining the League would under these conditions

divide the adherents to the outlawry of war.[15] A second group believes that a Third Hague Conference should be called for the purpose of discussing these principles by all states with a view to preparing such a treaty and undertaking the codification of international law. To this there is objection by League adherents who insist there is room for but one international organization and who are opposed to any conferences not conducted under its auspices. A third group is in favor of the United States calling an independent conference, without reference to either League or Hague Organization for the consideration of this subject. A fourth group is in favor of discussing and adopting the scheme for American states through the Pan-American Conference; or of having the Great Powers reach an agreement among themselves to negotiate such a treaty.

THE COURT OF JURISDICTION

Not less important than the code of law is the construction of a tribunal for its administration. The determination of a crime, as has been pointed out, is quite a different matter from the adjudication of a dispute. Whether a Court with a fixed personnel, constructed after the manner of the League Court or an arbitral tribunal established in the manner of The Hague Court, or some special Court, constructed to deal especially with threats of war and aggressions under a criminal code, shall be established is a proper question for an international conference to discuss.

The only organization to which objections appear not be insuperable is the Hague Conference; for all of the leading powers are members; Russia, Germany, Turkey and the United States would find it possible to attend; the atmosphere of The Hague is juridical and scientific, not political; and the machinery already exists for the calling of such a conference at little expense to the states participating.

OBJECTIONS TO THE OUTLAWRY OF WAR

In any new approach to a discussion of peace and war, it is but natural that objections should be raised. Some of these objections represent sincere doubts on the part of the advocates of peace and friends of justice; others are raised by those interested in the profits of

[15] The Democratic and La Follette platforms contain an endorsement of the outlawry of war in the planks upon foreign affairs. The Republican and Democratic platforms contain an endorsement of the Court of Justice; while the La Follette platform ignores it. The opposition in the Senate to the Court is, however, of a character not to insure the translation of any particular party policy into immediate reality.

war, or who have given their allegiance to other methods for promoting peace. Certain of the important objections may be noted as follows:

There exists a considerable body of opinion to the effect that disarmament should precede the outlawry of war, and that so long as nations maintain armaments, they will tend to rely upon them rather than adopt an outlawry of war program which prevents the use of this equipment for aggressive war. The proponents of the scheme, however, contend that so long as the war system is lawful, disarmament is impossible,[16] and nations will not disarm unless there is offered to them a security against war comparable to that which armaments afford.

There exists also the belief that the causes of war must be removed before war can be outlawed. The proponents of the scheme to outlaw war point out that as a condition precedent, this is contrary to the history of the regulation of crime. These laws do not seek to remove causes; they declare that certain acts, when committed or when the intent to commit them is clear, are crimes against the law, punishable in a specific manner by a duly established tribunal. The causes of murder, whether from passion or for gain, are precisely what they have always been, but their commission carries a penalty of death or imprisonment, and constitutes an example which few are willing to emulate. The causes of war—fear or desire for territory or power,—remain what they have always been, but upon them there has been no check and no brand of illegality. It was respectable for Italy to shell Corfu; it was legal for Poland to take Vilna; it was honorable for Greece to invade Turkish territory; it was contrary to no law to drop bombs upon the Bondelswartz although they had no means of defense. The motives which underlie these acts are precisely those of the early centuries when other methods of killing men in war were used. The advocates of the scheme, therefore, insist that the removal of the causes of war is neither possible nor necessary.

A third obstacle is the belief that war can be regulated by agreements as to the manner in which it is to be conducted. To this objection, reply is made that the Great War and the fourteen controversies following that war in which force was resorted to prove the contrary fact. The preparation for war, the inventions for war, the alliances for war, all prove beyond doubt that the engines of war once let loose cannot be regulated. The idea that men may be legally killed and women and children may not; that one form of bullet is permissible

[16] See Chap. XXXVI, p. 706, for description of armaments; and Chap. XXXVII, p. 738, for the disarmament scheme under the Treaty of Mutual Assistance.

and another is not; that one form of killing is legal and another illegal, because it is caused by different instruments, would be abhorrent if transposed into individual terms and applied to murder or arson. The supporters of the idea therefore hold that no security from war can arise from the attempts to regulate the methods of warfare, for man's ingenuity will always outstrip the law, unless war itself is made illegal.

A fourth obstacle is the idea that what the world needs is to build up habits and traditions of cooperation and machinery for such cooperation, in order to realize common interests. It is pointed out, on the other hand, that what the world most needs is concentration to enable it to focus upon some one plan against war which will achieve peace; that forces are now divided, and efforts are diffused. Now, one group tries one plan, and another group tries a second, each arguing the merits of its plan with the other; while they hold together under the vague appellation of cooperation. But it may be observed that the rift between the peace movements and the war movement is a wide one; and that countries which enjoy security are to be found in the group of cooperation for general peace, while those menaced by insecurity are generally to be found in the group which is building armaments.

A fifth obstacle is the argument that there is no substitute for the League of Nations; it possesses the necessary machinery and that any movement which does not include it should be opposed. This objection seems to be based upon the illusion that the League of Nations is without competition in the matter of the prevention of war and stands pre-eminent in the field. This has been shown not to be the fact. The Conference of Ambassadors is the principal in matters of peace or war; the Council is but the agent. In addition there is The Hague Organization, the Little Entente, the Baltic States Combination, special tribunals and other arbitral bodies and various defensive alliances which act independently of the League. These diverse agencies, established by members of the League, are dissociated from the League. They constitute substitutes for the League, since they are resorted to by League members, and the outlawry of war movement appears to be in consonance with these independent movements by states, whether members of the League or not.

A sixth objection is the argument that peace can be achieved only by a series of steps, and not by any fundamental and comprehensive schemes. Adherents of the scheme call attention to the fact that the

great achievements of the world have been wrought out of the heat of men's passionate convictions and that the Constitution of the United States was such an achievement; the Declaration of Independence was another; the abolition of slavery was another; and the eighteenth amendment, when it has ended its travail, will prove to be another. They hold that the outlawry of war is a great conception, worth keeping in the purity of its form, worth deferring until its time has come, and that it does not fit into the lockstep of the Treaty of Versailles.

Another objection is that the absence of the fear of war will destroy the patriotic spirit which men are accustomed to associate with security and national destiny. Switzerland refutes these allegations. For many centuries, there has been no war or threat of war in that country and yet it is reckoned among the most intensely patriotic countries in Europe. In the United States, there is no danger of war among the states and yet among European states there is hardly a counterpart to the local patriotism of the states which vie with each other. The feeling of rivalry between Paris and London is not more intense than the rivalry between residents of New York, Chicago and San Francisco. That a country not engaging in aggressive warfare from time to time to settle disputes is less likely to have a high quality of patriotism when attacked is not a demonstrated fact. That militarists and not pacifists, and that men who believe in an adequate army and navy for defense, lead this movement, is a refutation that it is a pacifist movement or that it threatens patriotic ardor.

THE PRESENT STATUS OF THE AMERICAN PLAN

From the foregoing statement it is evident that the plan to outlaw war which is taking root in the United States as a future policy for peace, is still in the formative stage; and has not yet progressed to the point where the technical features have been fully considered.[17] It is being discussed and endorsed by various leaders and organizations; it is before the United States Senate; it is the subject of planks in both the Democratic and La Follette platforms as has been endorsed by President Coolidge and doubtless will be the subject of political discussion in the presidential campaign of 1924. Certain of its features are before the members of the League of Nations. But American official approval has not been given to the idea and until the passage of the Borah Resolution, or some equivalent measure, authorizing the President to open negotiations with other states concerning the

[17] See Chap. XXXVIII; p. 774.

matter, the plan as an American proposal will not be before the nations of Europe in a form to commit the United States Government to its support. The wide acceptance of the idea throughout the country is an established fact which has yet to find its way into official action and the proper technical construction before its consideration by foreign states is sought officially with a view to formulating a convention.

Although not included in the Republican platform, President Coolidge has been the first of the candidates to give this movement his endorsement. In his speech of acceptance, on August 14th, 1924, he said:

> "When the reparations plan is in operation I shall deem it an appropriate time to approach the great powers with a proposal for another conference for a further limitation of armaments and for devising plans for a codification of international law. I personally should favor entering into covenants for the purpose of outlawing aggressive war by any practical means. Our country has always been against aggressive war and for permanent peace. Those who are working out detailed plans to present such a policy for consideration have my entire sympathy."

CONCLUSION

From the foregoing examination of the controversies which have arisen since the World War and from the narrative of their settlement, various conclusions are possible; but from the trend of events in Europe and of public opinion in the United States it is apparent that the policies of Europe and the United States are not in harmony. The differences are basic and the task of reaching common ground for cooperation is one of enormous difficulty.

Upon one policy—the abhorrence of war—there is agreement; and upon another policy—the substitution of law for force—there is a near agreement. Upon the points of attack to accomplish the abolition of war and the substitution of law there is divergence of opinion and upon the methods to be pursued, frank antagonism. Taking these things into consideration, and limiting these conclusions to the matters in review, the following are among the conclusions which the foregoing discussion appears to justify:

TERRITORIAL SECURITY

Territorial security is of the first order of importance. It has not been guaranteed by the Peace Treaties nor assured under Article 10. The sense of insecurity has increased among nations despite efforts toward disarmament and mutual assistance. The regulation of warfare and the resort to force have failed to remove the menace of war. The craving for territorial security overshadows every other consideration among European states.

The institution of war as a method of settling disputes is in itself an evil which has refused to yield to regulation or license; therefore it should follow the course of other institutions of destruction and be made a crime against the law of nations wherein a state may not retain the spoils of invasion and shall pay the costs upon being adjudged guilty of a war which is declared to be a crime.

Such abolition will not restore the territorial inequities which have been imposed as the penalty of war. They are a survival of the war system. Therefore the international convention which abolishes war should lay down the principles upon which territorial readjustments may be made: as to the circumstances under which geographic, racial or economic principles shall apply; as to circumstances in which plebiscites are desirable; and such other principles as may be necessary to

guide negotiations or a court of international law. It should not be possible again for a Peace Treaty to be concluded in which the fundamental principles of territorial division and adjustment were so misapplied as at the Paris Conference; nor for a court to be left without guiding principles in judgments concerning the rectification of boundaries. With the removal of military and strategic motives, made unnecessary by the abolition of war, it should be possible to apply sound principles to the rectification of boundary lines which otherwise germinate wars.

RACIAL SECURITY

Racial security is of the next order of importance. It has not been guaranteed by the Peace Treaties nor by the Minority Treaties. Oppression of minorities has prevailed despite the efforts of the League of Nations. The Allied Powers have refused to assume their responsibility under these Treaties, and the League has had to conform its activities to their policy. This blockade of justice to millions of people in Europe is a menace to peace.

The impotence of the Allied Powers and of the League and the prevailing conditions of injustice and unrest are justification for the belief that the protection of minorities should be made the subject of a general convention, created with the consent of the parties, to replace the special treaties imposed upon the states and thus disregarded. These special Minority Treaties possess the inequality of being imposed upon some states while other states under similar conditions escape their application. Small states resent obligations which are not applicable to large states. The remedy for this unequal situation appears to be a general convention in which there shall be laid down the principles of international law defining the rights of minorities; the rights of governing states; and the line of demarkation between the sovereignty of the state and international aspects of the question. In the absence of such fundamental understandings, there is no guide for public opinion; and no guide for a court to which minorities may wish to appeal.

ECONOMIC SECURITY

The question of reparations may not have reached the stage where states are willing to consider its reduction to principles of international law; but that it should be left in future for victorious parties to determine, or commissions to fix, or tribunals to impose without the underlying principles being established is a certain menace to future peace. The experience with Germany in the occupation of the Ruhr is an instance in point. The reparations clauses of the Versailles Treaty,

with this experience at hand, might well serve the purpose of a basis for discussion. The imposition of reparations to the extent of demoralizing a country, necessitating loans for its rehabilitation in order to enable it to pay reparations is not of an order of economic intelligence to commend itself to the future. The question of sanctions for reparations may well constitute the basis for future wars if they include the occupation of territory and the oppression of peoples, now recognized as prime causes of war.

Therefore, the inclusion in Treaties of Mutual Assistance or of Disarmament and Security or in conventions to outlaw war, of the obligation of a state, declared to be guilty of the crime of war, as defined, to pay the costs of war, is a menace to peace unless it be in conformity with recognized legal principles governing the prescription of such costs, their manner of assessment and the sanctions which are permissible by law against a defaulting state. A scientific study of the operation of the principles of reparations, as applied under the Peace Treaties, together with a formulation of principles for discussions by states might with propriety be undertaken by a juridical body without immediate interest in the pending reparations schemes.

POLITICAL SECURITY

As has been seen, the question of what matters states are willing to place under international control and what matters they reserve under their own sovereignty is nowhere clearly drawn. What questions are political and therefore to be regarded as domestic and what are legal is also the subject of confusion, depending for definition upon the good will of the state. What questions are justiciable and what non-justiciable is also an unsolved problem. A sub-committee of the Hague Conference of 1907 was given the consideration of this question. A new conference should finish the work. So long as these questions may be interpreted as each state sees fit, according to its desire to arbitrate or not to arbitrate, the provisions of the Covenant and of the Court Statute will be inadequate to substitute law for war.

THE LEAGUE OF NATIONS

The question arises as to the manner of establishing territorial, racial, economic and political security. Granted that conventions are necessary and a code of law essential, what medium shall be used for their formulation and administration.

In view of its partial membership and failure to grant to states any appreciable measure of territorial security (reserved to the Confer-

ence); or racial security (reserved to members of the Council); or economic security (reserved to the Conference); or political security (desired by the Council for international purposes); the League of Nations does not appear to be the body which can best perform these services. Its competence for drafting conventions of the order named, for the formulation of a code of law, and as an arbitral tribunal to interpret or administer such measures has been demonstrated and may be recapitulated as follows: (1) The Council is an executive body, acting as the agent of the Allied and Associated Powers in the execution of certain terms of the Peace Treaties; (2) the Council is an advisory body, making recommendations to the Conference of Ambassadors under these Treaties; (3) the Council is an administrative body, governing territory which may be involved in the settlement of a dispute; (4) the Council is a legislative body, supervising the negotiation of conventions which an arbitral tribunal might have to interpret; (5) the Council is a representative body of the governments which compose it and as such is controlled by the policies of the foreign offices of these governments; (6) the Council requires unanimity of vote in which event any one foreign office would control its decisions; (7) the Council is created by and is amenable to the Covenant which certain important states have refused to accept.

It is submitted that each and every one of these functions disqualifies the Council to maintain a judicial point of view, to act impartially or independently; and to sustain that relation to juridical questions which states require if they are to place confidence in a tribunal or general convention.

Also, certain tendencies exhibited by the Council in disregard of accepted juridical principles have destroyed faith in that body as one qualified to perform the legal services essential to national security. Its tendency to emphasize political aspects of questions at the sacrifice of their legal aspects; to substitute political commissions of jurists for the Court of Justice; to supplant judgments with advisory opinions in actual cases; to benefit by its own decisions; to conduct inquiries, hearing only one side; to proceed against states not parties to the Treaties under which the action is brought;—these acts tend to the corruption of juridical principles rather than to their firm establishment. By the sacrifice of such principles to political expediency; by the establishment of the concept that peace and justice are divisible; and by the precedent that peace at any cost must be preserved, the Council has done incalculable harm to the cause of justice and thus to peace.

These concepts and other multifarious duties have and will deter states from placing confidence in the Council for mediation on the ground that it is not an impartial judicial body, that it is not bound by arbitral rules and standards, and that its other activities unfit it for juridical duties. In states having constitutional governments these objections will tend to increase. The dual personality of the Council must also be a matter of grave concern to states which contemplate entrusting the settlement of their disputes to that body. The policy of the Covenant is to safeguard state sovereignty; and acting as its executive, this is the duty of the Council. But acting under authority conferred upon it by other instruments, the policy of the Council is to infringe upon that state sovereignty—and to extend its domain through conventions in which small or comparatively helpless states are invariably the losers. Therefore, the less attention paid to the Covenant as a theoretic compact for peace and the more consideration given to the significance of each and every act of the Council, taken under its many diverse powers, the more certain will be the observations upon the security of State sovereignty.

Therefore, any suggestions tending to improve the arbitral functions of the Council would appear to be in direct contradiction to the acquirement of executive and legislative functions by that body under the Peace Treaties, which fact must eventually disqualify the Council as an impartial tribunal of conciliation; and to that end efforts should be made to strengthen the Hague Organization to resume the duties which it has so well performed in the past and to develop it as a medium to abolish war.

THE THIRD HAGUE CONFERENCE

The Hague Organization possesses none of the above handicaps. That system makes provision for mediation, inquiry, and arbitration in order to meet the requirements of states with reference to disputes of varying degrees of gravity and delicacy, and either less or more rigid procedures. It provides for the elimination of nationals from the bench whose views are known to be unsympathetic to a party, and for that detachment from executive and legislative aspects of a question which all countries have deemed to be essential.

If the cooperation of the United States is desired for the preparation of a code of international law, which shall include a convention to outlaw war, a convention to deal with minorities as a menace to war, and the formulation of the principles of international law which should govern questions affecting reparations and the sovereignty of states, it is necessary that a Third Hague Conference be called. Such a con-

ference would also undertake the project put forth by the Advisory Committee of Jurists, namely, the re-establishment of existing rules of the law of nations, especially those affected by the recent war; the formulation, approval, modifications and additions rendered necessary and advisable by the war; the reconciling of divergent opinions and bringing about of a general understanding concerning the rules which have been the subject of controversy; and giving especial consideration to points not adequately provided for but where agreement seems desirable in the interests of international justice; together with bringing these matters into the proper relation with laws abolishing war.

AN INTERNATIONAL JURIDICAL SYSTEM

A code of international law presupposes an independent judicial tribunal, in name as well as in fact, which shall have jurisdiction within certain specified limits, safeguarding domestic questions and those of a defined political character. This tribunal shall determine questions which threaten a rupture between states, and shall be the judge of the issue.

It is apparent that the relationship of the Court to the League, the resort to advisory opinions instead of judgments, and the adoption of a permanent personnel in arbitral proceedings have caused misgivings in the United States to the extent that it has not been willing to adhere to the Court without reservations and possibly amendments. It is apparent that European powers, although members, experience somewhat of the same misgivings, due to other reasons; for they have not submitted their disputes to the Court. It would, therefore, be a pertinent subject for a Third Hague Conference, in which all states were represented, to examine the structure and competence of the two Courts, with a view to their differentiation and use; their relation to each other and future development.

Also the High Court of Justice, recommended by the Advisory Committee of Jurists and rejected by the League, should receive from a Third Hague Conference the consideration it merits. In the event that a convention for the outlawry of war is created, the construction of a High Court of Justice, obviating certain features of the Court of Justice to which objection is now made, might prove feasible.

The obvious inconvenience of submitting disputes to one Hague tribunal (together with the project under consideration by the next Pan-American Conference for the establishment of a Court for American states) suggests for the consideration of the next Hague Conference the establishment of an international system of jurisprudence, operating under a code of international law. In that event it might prove possible

to constitute the Court of Justice as the European Court; to extend the Hague Organization to include hemispherical courts to be administered as part of the Hague system for the Pacific Settlement of International Disputes; and to create a High Court of Justice to try the crime of war, sitting in the hemisphere of the defendant country.

JURIDICAL CONSIDERATIONS

The foregoing record indicates that there is no protection against territorial aggression, except the armies and navies of states; hence there is no reduction of armaments and no assured security; there is no protection of minorities that is either certain or expeditious; hence there are threats of war; there is no law underlying the settlement of disputes; hence arbitration and judicial settlement are ignored; there is no basic principle governing reparations; hence the vagaries of assessment and of collection cause ruptures; there is no legal definition of what is international and of what constitutes the sovereign rights of states, and no determination of what is political and what juridical; hence the will of the stronger prevails; there is no conviction that law can and must supersede war; hence force is the accepted method of settling disputes.

Therefore, as indicated by the record of the settlement of disputes, the following juridical considerations are submitted:

The revision of the Covenant, especially with reference to Articles 8, 10, 11, 12, 13, 15, 16 and 17, dealing with aggression, sanctions and the settlement of disputes.

The revision of the Court Statute, with reference to optional obligatory jurisdiction, to the use of the Court by non-member states, to sanctions, to amendments and to advisory opinions.

Review of Treaties of Peace by signatories thereto, submitting questions of their interpretation to the Court, and authorization to the Court to recommend, after hearings granted to all interested parties, revisions of provisions which otherwise are likely to lead to war.

The establishment of a juridical system in the various hemispheres to carry forward the standards of the Hague Conference of 1907.

Plans whereby the Hague Organization may continue its juridical work, including conferences for the codification of law and whereby the League may be occupied with political and humanitarian activities, under the Peace Treaties.

Investigation in various countries of the subject of the outlawry of war, with a view to ascertaining its legal difficulties and practical possibilities, prior to calling a convention or framing a statute.

Discussion of security and armaments to be preceded by a thorough

investigation in order to define the possibilities and limitations of subjects for a future conference, in place of plans designed to control armaments in the whole world, the states of which have different problems, points of view, interests and laws.

Direction of attention to economic alliances of assistance as a substitute for military alliances, in the event of aggression; especially in view of the fact that such military alliances may prove ineffective in new methods of warfare, wherein financial assistance will be all important.

The codification of law by an impartial juridical body, not acting under instructions from foreign offices, and detached from political control, with especial reference to defining aggression, arbitration, justiciable, legal and other aspects of questions; and with a view to drafting conventions, establishing the principles of international law, as outlined by the Advisory Committee of Jurists.

The restriction of the powers of the Council within the limits of the Covenant; no new duties to be laid upon it without the consent of the members of the League in whose name the duties are performed, and restoration to the Assembly of rights now exercised exclusively by the Council.

The legal interpretation of the Covenant either by the Assembly or by the Court and the discontinuance of its interpretation by Committees of Jurists, appointed by the Council: Also, in the adoption of new schemes, observance of Covenant provisions to be strictly adhered to.

The separation of arbitral, executive, legislative and judicial functions now exercised by the Council, with the adoption of a procedure for each, in order that member states may be assured of equal and uniform treatment at all times, in all of their affairs before the League.

The issuance of standard legal publications concerning matters of international action and policy, containing complete files of original documents, impartial summaries and free from propagandist material, and in a form accessible to the people of the various countries.

Restraint to be exercised by citizens in proposing juridical plans for reforming Europe, which plans have not been considered nor discussed nor approved by their own government; or unless they are invited to do so by governments or by their duly constituted agencies.

Should the consideration of peace plans follow these lines, confidence among nations and the sense of security might well increase, for they rest upon foundations of law and tend toward the establishment of justice.

ANNEX II

STATUTE OF PERMANENT COURT OF INTERNATIONAL JUSTICE

Article 1

A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

CHAPTER I

Organization of the Court

Article 2

The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Article 3

The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

Article 4

The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

Article 5

At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the Members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently, and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

ARTICLE 6

Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

ARTICLE 7

The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment.

The Secretary-General shall submit this list to the Assembly and to the Council.

ARTICLE 8

The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

ARTICLE 9

At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

ARTICLE 10

Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected.

In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

ARTICLE 11

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

ARTICLE 12

If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance.

If the Conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5.

If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council.

In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

ARTICLE 13

The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

ARTICLE 14

Vacancies which may occur shall be filled by the same method as that laid down for the first election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

ARTICLE 15

Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

ARTICLE 16

The ordinary Members of the Court may not exercise any political or administrative function. This provision does not apply to the Deputy Judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

ARTICLE 17

No Member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they are called upon to exercise their functions on the Court.

No Member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a Member of a national or international Court, or of a commission of enquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

ARTICLE 18

A Member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.

Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar.

This notification makes the place vacant.

ARTICLE 19

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

ARTICLE 20

Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

ARTICLE 21

The Court shall elect its President and Vice-President for three years; they may be re-elected.

It shall appoint its Registrar.

The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

ARTICLE 22

The seat of the Court shall be established at The Hague.

The President and Registrar shall reside at the seat of the Court.

ARTICLE 23

A session of the Court shall be held every year.

Unless otherwise provided by rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

ARTICLE 24

If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President.

If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly.

If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

ARTICLE 25

The full Court shall sit except when it is expressly provided otherwise.

If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit.

If however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

ARTICLE 26

Labor cases, particularly cases referred to in Part XIII (Labor) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labor Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of

the Labor Office. The Governing Body will nominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding Articles of the other Treaties of Peace.

In Labor cases the International Labor Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

ARTICLE 27

Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favor of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each Member of the League of Nations.

ARTICLE 28

The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

ARTICLE 29

With a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

ARTICLE 30

The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

ARTICLE 31

Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this Article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on any equal footing with their colleagues.

ARTICLE 32

The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-President, judges, and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the League of Nations shall lay down, on the proposal of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

ARTICLE 33

The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

CHAPTER II

Competence of the Court

ARTICLE 34

Only States or Members of the League of Nations can be parties in cases before the Court.

ARTICLE 35

The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court.

ARTICLE 36

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in the

Annex to the Covenant may, either when signing or ratifying the protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(*a*) The interpretation of a Treaty;

(*b*) Any question of International Law;

(*c*) The existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

ARTICLE 37

When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

ARTICLE 38

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

2. International custom, as evidence of a general practice accepted as law;

3. The general principles of law recognized by civilized nations;

4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision shall not prejudice the power of the Court to decide a case *ex æquo et bono,* if the parties agree thereto.

CHAPTER III

Procedure

ARTICLE 39

The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorize a language other than French or English to be used.

ARTICLE 40

Cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application addressed to the

Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

ARTICLE 41

The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party.

Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

ARTICLE 42

The parties shall be represented by Agents.

They may have the assistance of Counsel or Advocates before the Court.

ARTICLE 43

The procedure shall consist of two parts: written and oral.

The written proceedings shall consist of the communication to the judges and to the parties of cases, counter-cases and, if necessary, replies; also all papers and documents in support.

These communications shall be made through the Registrar, in the order and within the time fixed by the Court.

A certified copy of every document produced by one party shall be communicated to the other party.

The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

ARTICLE 44

For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the Government of the State upon whose territory the notice has to be served.

The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

ARTICLE 45

The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

ARTICLE 46

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

ARTICLE 47

Minutes shall be made at each hearing, and signed by the Registrar and the President.

These minutes shall be the only authentic record.

ARTICLE 48

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

ARTICLE 49

The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanations. Formal note shall be taken of any refusal.

ARTICLE 50

The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

ARTICLE 51

During the hearing, any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

ARTICLE 52

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

ARTICLE 53

Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favor of his claim.

The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

ARTICLE 54

When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed.

The Court shall withdraw to consider the judgment.

The deliberations of the Court shall take place in private and remain secret.

ARTICLE 55

All questions shall be decided by a majority of the judges present at the hearing.

In the event of an equality of votes, the President or his deputy shall have a casting vote.

ARTICLE 56

The judgment shall state the reasons on which it is based.

It shall contain the names of the judges who have taken part in the decision.

ARTICLE 57

If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

ARTICLE 58

The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

ARTICLE 59

The decision of the Court has no binding force except between the parties and in respect of that particular case.

ARTICLE 60

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

ARTICLE 61

An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.

The proceedings for revision will be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.

The application for revision must be made at latest within six months of the discovery of the new fact.

No application for revision may be made after the lapse of ten years from the date of the sentence.

ARTICLE 62

Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party.

It will be for the Court to decide upon this request.

ARTICLE 63

Whenever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith.

Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it.

ARTICLE 64

Unless otherwise decided by the Court, each party shall bear its own costs.

ANNEX III

SENATE RESOLUTION SEPARATING THE LEAGUE AND THE COURT

Whereas the Senate has had under consideration the message from the President of the United States dated February 24, 1923, in which the Senate is asked to consent to the signature by the United States of the Protocol of December 16, 1920, establishing the Permanent Court of International Justice, and has likewise had under consideration the message from the President of the United States dated December 6, 1923, in which this proposal is again commended to the favorable consideration of the Senate, and

Whereas the proposal thus submitted and commended contemplates the signature of the Protocol by the United States upon such conditions as will enable the United States to give its adherence to the Court while remaining wholly free from any legal relationship to the League of Nations, and

Whereas it is desirable to express with greater precision the safeguards suggested in general terms in the message of President Harding: Now be it therefore

Resolved by the Senate of the United States:

First: That the Senate approves the pending proposal and advises the adherence of the United States to the Permanent Court of International Justice upon the terms hereinafter specified.

Second: That permission to the United States to participate in the election of future judges should, in the opinion of the Senate, take the form of an amendment to those portions of the Statute of the Court which prescribe that the election shall be by the Assembly and Council of the League of Nations.

Third: That the Senate advises the President to communicate with the States which have adhered to the Court for the purpose of securing assent to such amendments to the Protocol and the Statute as will accomplish the disassociation of the Court from the League of Nations.

Fourth: That the Senate advises and consents to the signature by the United States of the Protocol of December 16, 1920, when the same shall have been amended as specified in the first annex to this resolution and when amendments shall have been made to the adjoined Statute as specified in the second annex hereto.

Fifth: That the signature of the United States of America shall be understood to be affixed subject to the declaration that the United States disclaims all responsibility for the exercise by the Court of the jurisdiction to render advisory opinions, and subject to the further declaration that the United States intends to adhere to the Monroe Doctrine as a national policy and assumes no obligations inconsistent therewith.

Sixth: That the signature by the United States herein referred to is a signature to the Protocol as set forth in this resolution but not to the so-called optional clause referred to in Article 36, paragraph 2, of the Statute of the Court.

Seventh: That the Senate advises the President that a Third International Conference similar to the Hague Conferences of 1899 and 1907 be called not later than the year 1926 for purposes which shall include the giving of effect to the recommendation of the Committee of Jurists upon the basis of whose report the Court was established, regarding the clarification and further development of international law, and the codification therof.

First Annex to the Resolution

"Protocol of Signature

"The Signatories of this Protocol, through the undersigned, duly authorized, declare their acceptance of the adjoined Statute of the Permanent Court of Inter-

national Justice, and hereby declare that they accept the jurisdiction of the Court in accordance with the terms and subject to the conditions of the above-mentioned Statute.

"The present Protocol shall be deposited, after ratification, with the Secretary-General of the Permanent Court of Arbitration at The Hague.

"The said Protocol shall remain open for signature by all nations generally recognized by treaty or diplomatic relations with the Signatories.

"The adjoined statute shall come into force as an amendment of or substitute for the existing statute as soon as all the Signatories of the protocol of 16 December, 1920, shall have deposited their assent thereto with the Secretary-General of the Permanent Court of Arbitration at The Hague in a single copy, the French and English texts of which shall both be authentic."

SECOND ANNEX TO THE RESOLUTION

A. Substantive Amendments to the Adjoined Statute

(1) Strike out Article 4 and substitute a new article as follows:

"ARTICLE 4

"The present judges and deputy-judges constituting the Permanent Court of International Justice shall retain their offices under the Statute of the Court."

(2) Strike out the first paragraph of Article 5 and substitute the following:

"ARTICLE 5

"Vacancies which occur either by expiration of term or otherwise shall be filled by the States which at that time are Signatories to the Protocol. At least three months before the date of an election to fill any such vacancy the Secretary-General of the Permanent Court of Arbitration shall address a written request to the Members of the Permanent Court of Arbitration, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court."

(3) Strike out Article 8 and substitute a new article as follows:

"ARTICLE 8

"Representatives of all the Signatories to this Protocol shall meet at such time and place as may be designated by the said Secretary-General and shall proceed to an election. The representatives of all Signatories shall ballot as an electoral assembly. The States named in the Versailles Treaty as the Principal Allied and Associated Powers, together with such five of the other Signatory States as shall be selected by the Signatories shall ballot as a separate electoral council. The Assembly of Signatories and the Council of Signatories shall proceed independently of one another to elect, first the judges, then the deputy-judges. In each electoral body each Signatory State shall have one vote; but not more than one vote shall be cast in either Assembly or Council by the British Empire and the States included therein."

(4) Strike out Article 10 and substitute a new article as follows:

"ARTICLE 10

"Such nominee as shall receive a majority of votes in the electoral Assembly and a majority of votes in the electoral Council shall be elected a judge or deputy-judge, as the case may be.

"In the event of more than one national of the same Signatory State being

elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected."

(5) Strike out Article 34 and substitute a new article as follows:

"ARTICLE 34

"Only States can be parties in cases before the Court."

(6) Strike out Article 35 and substitute a new article as follows:

"ARTICLE 35

"The Court shall be open to all States generally recognized by treaty or diplomatic relations with the Signatories.

"When a State which is not a Signatory is a party to a dispute the Court will fix the amount which that party is to contribute towards the expenses of the Court."

B. Formal Amendments to Carry the Foregoing into Effect

(1) In the following articles strike out "Assembly" (or "Assembly of the League of Nations") and "Council" (or "Council of the League of Nations") and substitute "Assembly of Signatories" or "Council of Signatories," as the case may be: Articles 3, 12, 32, and 41.

(2) In the following articles strike out "Member of the League of Nations" and substitute "Signatory State": Articles 26 and 27.

(3) In the following articles strike out "The Secretary-General of the League of Nations" and substitute "The Secretary-General of The Permanent Court of Arbitration": Articles 7 and 18.

(4) In Article 1, after "established," substitute a period for a comma and strike out "in accordance with Article 14 of the Covenant of the League of Nations."

(5) In Article 7 strike out the last six words and substitute "each of the Signatories."

(6) Transfer the last two paragraphs of Article 12 to a new article to be numbered Article 13.

(7) Strike out in Articles 12 and 31 "Articles 4 and 5," and substitute "Article 5."

(8) Strike out the first sentence of Article 14 and transfer the residue of the Article so that it shall become the last sentence in Article 5 as amended.

(9) In Article 36 strike out the first seventeen words of paragraph 2 and substitute "a State," and for the words "they recognize" in the same paragraph substitute "it recognizes."

(10) In Article 40 strike out the last paragraph.

ANNEX IV

REPORT FROM THE COMMITTEE ON FOREIGN RELATIONS, SUBMITTED BY MR. PEPPER, TO ACCOMPANY S. RES. 234

The Committee on Foreign Relations submitted the following report to accompany Senate Resolution 234 advising the adherence of the United States to the Permanent Court of International Justice with certain amendments.

In compliance with the message from the President of the United States (President Harding), dated February 24, 1923, in which the Senate is asked to consent to the signature by the United States of the protocol of December 16, 1920, establishing a Permanent Court of International Justice, and with the message of December 6, 1923 (by President Coolidge), in which the former message is commended to the favorable consideration of the Senate, the Committee on Foreign Relations reports that it has carefully considered this proposal and submits herewith a resolution with the recommendation that it do pass.

In reporting this resolution the committee has taken affirmative and favorable action upon the recommendation of President Harding and President Coolidge that we should adhere to the court but not to the League of Nations.

The resolution accepts the court as an established institution and confirms the tenure of the present judges. If the resolution is adopted the President will be in a position, without further recourse to the Senate, promptly to conclude with the states now adhering to the court a simple, direct, and reasonable agreement. Under its terms the United States, without reservations and without the least interference with the business of the court, will align itself with 48 other states in maintaining and perpetuating this important international tribunal.

On the other hand, the United States will remain, in that event, wholly free from any legal relation to the League of Nations. Not only will this be true as to the United States but the existing legal relation between the court and the league will be severed for all States, so that the United States will occupy no anomalous or peculiar position but will stand upon the same footing as all the rest.

WORLD COURT AND WORLD LAW

In two important particulars the resolution goes beyond the proposal of President Harding and embodies two ideas which President Coolidge has emphasized.

One of these is the American idea of a court to which not only league members but all states may adhere—the idea, that is, of a true world court.

The other is the idea of a world law for a world court to interpret and apply. Without such a body of law made for it, we may call the tribunal a court of law, but it will necessarily become either a mere tribunal of arbitration or else an international lawmaker.

The ideal of a world court can be attained under the resolution because it proposes to allow adherence to the court by any state recognized by any signatory power.

The ideal of a world law can be realized under the resolution through the calling of a third international conference, similar to The Hague conferences of 1899 and 1907, for the clarification and further development of international law and the codification thereof.

It is not generally known that the committee of jurists of which Mr. Root was a member, on whose report the plan of the court was based, advised the Council of the League of Nations not merely to set up the court but to call a conference

to clarify and develop international law. The advice was not followed. The resolution proposes that it shall be followed now.

BRIEF HISTORY OF THE COURT

It will be remembered that the history of the court is, briefly, as follows:

At The Hague conferences the representatives of the United States pressed a plan for a court of justice corresponding in a general way with the structure of the court which now exists. An obstacle was found in attempting to devise a satisfactory plan for choosing the judges. The attempt was not abandoned, however, because everybody agreed that the establishment of a permanent world court of justice would make for international peace.

The reasons why this is so and why we need a supplement to The Hague Court of Arbitration were admirably stated by Secretary Hughes in an address from which an extract is appended to this report.

When the covenant of the League of Nations was being drawn the project of a permanent court of justice was again taken up and an article (14) was inserted in the covenant which reads as follows:

> The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

Thereafter the council of the league invoked the aid of the committee of jurists above referred to. The plan of the present court was drawn up by this committee, was submitted to the council, was amended by the council and by the assembly of the league and was finally adopted by the latter on December 13, 1920.

THE PLAN AND THE PROTOCOL

The plan thus approved was embodied in a statute which was intended to be the fundamental law of the court's being. In order that this statute might become operative, it was necessary to prefix to it a treaty for the signature of such states as by its terms were eligible to sign. This prefixed treaty, which had no other function than to make the statute of the court operative, is known as the protocol, or the protocol of signature. It became operative on December 16, 1920, and to date has been signed by 48 of the 54 states which are members of the League of Nations. The protocol, by its terms, remains open for signature by any state that is a member of the league or is mentioned in the annex to the league covenant. As the United States is thus mentioned, it is eligible to sign. That the United States should sign is the proposal of the two Presidents, and this proposal is now recommended for acceptance of the Senate.

Under the terms of the statute the judges of the court are elected by the concurrent action of the assembly and council of the League of Nations. This means in practice that the 10 states in council and the whole body of states in assembly act as a check upon one another. It was this expedient, suggested by the committee of jurists, which proved satisfactory to both the larger and smaller powers. The system of reciprocal checks would be continued if the pending resolutions were adopted and carried into effect, except that only states enough interested in the court to adhere to it would be permitted to vote either in assembly or in council. At present states represented in the league may vote for judges of the court, in virtue of league membership, without adhering to the court or becoming directly responsible for its maintenance.

THE RELATION OF COURT AND LEAGUE

The provision of the statute that judges shall be elected by the assembly and council of the League of Nations creates a direct legal relation between the court and the league, and between the league and any state that votes in its assembly or council. In harmony with this relation are various other provisions of the statute, such as the provision that the expenses of the court shall be borne by the league and that certain administrative functions shall be discharged by the secretary general of the league. Likewise in harmony with this relation, the covenant of the league authorizes the council to treat the court as the legal adviser of the league by calling upon the court for advisory opinions. Of the nine matters so far dealt with by the court eight have been the subject of advisory opinions. The jurisdiction to give such opinions, whether or not it is impliedly sanctioned by the statute of the court, is believed by the committee to be a highly dangerous and undesirable jurisdiction. The pending resolution gives notice that the United States would disclaim all responsibility for the exercise of such a function by the court.

The existence of the above described direct legal relation between the court and the league constituted no difficulty in the way of President Harding's proposal as far as league advocates were concerned. On the contrary, they welcomed the proposal of adherence to the court as a first step toward membership in the league. But to President Harding and to Secretary Hughes the relation was a fatal obstacle to adherence, because both were as firmly determined as is President Coolidge that the United States shall remain wholly free from any such relationship to the League of Nations. Accordingly when President Harding communicated his message of February 24, 1923, he was at pains to make this clear. With his message he transmitted a letter from the Secretary of State in which the latter specified two of the conditions of adherence in the following language:

> That such adhesion shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the covenant of the League of Nations constituting Part I of the treaty of Versailles.
>
> That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other States members, respectively, of the council and assembly of the League of Nations in any and all proceedings of either the council or the assembly for the election of judges or deputy judges of the Permanent Court of International Justice, or for the filling of vacancies.

The pending resolution has been drawn in an effort to satisfy these essential conditions.

AMENDMENT, NOT RESERVATION

It has often been suggested by the advocates of precipitate adherence that these conditions can be met by making reservations when the United States signs the protocol. A reservation merely gives notice of the terms upon which a State understands itself to be signing. If there is no objection upon the part of other signatories, the reservation becomes effective. But in the present case it is not a question of terms of signature; it is a question of the inevitable consequence of signature upon any terms. The assembly and council of the league alone are entitled under the statute to vote for judges. As long as this statutory provision is unamended the vote of the United States simply can not be counted. Therefore, if we are to adhere to the court, the statute must be amended at least in this particular. No reservation can possibly accomplish the result. When reservations are spoken of in this connection the word is used in its popular rather than

in its technical sense. It is to be noted that the Secretary of State does not describe the necessary safeguards as reservations but as "conditions and understandings." They are just that; and they must operate by way of amendment to the statute.

THE VITAL QUESTION

It is at this point that the only really debatable question arises, namely, whether the United States shall suggest an amendment to the statute which, when made, will be applicable to the United States alone, or whether the suggested amendment shall be one which, once for all, severs the legal relation between the court and the league for the benefit of all concerned.

In other words, the question is whether the amendment shall be such as to prevent a legal relation between the United States and the league or such as to sever for everybody and forever the existing legal relation between the court and the league.

Shall the other 48 signatories vote for judges in virtue of their league membership, while the United States alone votes directly? Or shall everybody, including the United States, vote in virtue of being a signatory of the protocol, so that the judges elected in future shall derive their commissions exclusively from the states that adhere to the court?

The proposal of amendment to the statute as submitted by President Harding contemplated adherence by the United States upon terms applicable to the United States alone. In advising favorable action upon his proposal the pending resolution varies it to the extent necessary to secure for all signatories what the committee believes to be of vast importance to the court as an institution—namely, such disassociation from the League of Nations as would make the court a complete and independent international institution such that if the league were ever to become discredited, or were to be dissolved, the court would be absolutely unaffected by its discredit or by its dissolution.

THE SWANSON RESOLUTION

It will be noted that the messages of the two Presidents submit no document of signature to the Senate. They merely present a proposal and indicate the safeguards which should surround it.

In this connection the committee refers to Senate Resolution 220, introduced by Senator Swanson. This resolution, like the committee resolution, is based upon the Harding proposal. It resembles the Harding proposal in that it contemplates amendments affecting the United States alone; but it makes no attempt to specify what amendments are needed or to indicate how the disclaimed legal relation is to be avoided. It gives to the Executive an authority to bind the United States upon conditions which are those described by the Secretary of State, but it fails to present to the Senate the draft of any document in treaty form to the signature of which the Senate can consent.

In other words, the Swanson resolution in effect approves the Executive proposal with certain amendments, but fails to perform the legislative function of giving it exact and concrete expression.

THE COMMITTEE RESOLUTION

The resolution recommended by the committee aims to discharge this legislative function and, since amendments are admittedly necessary, advises the President to suggest to the other powers amendments which have a more enduring value than merely to make possible the adherence of the United States. It was for this reason that the committee rejected the Swanson resolution and adopted in preference to it the resolution now reported.

Instead of perpetuating the system of electing judges by action of the Assembly and Council of the League of Nations the committee resolution proposes direct action by the signatories themselves. In order to preserve the proper relation between the votes of larger and smaller States the method of voting in assembly and in council is retained. The resolution contemplates a council of 10 signatories. But the number might well by amendment be increased to 11, in order to make possible the inclusion of the United States and all of the 10 other States represented in the council of the League of Nations. But under the resolution no State is entitled to vote except in virtue of being a signer of the court protocol; and, conversely, all States that sign stand on precisely the same footing and occupy the same relation to one another and to the court. Direct and universal suffrage instead of the electoral college method is the principle which underlies the committee resolution. The change in the statute necessary to apply the principle relates only to the filling of future vacancies. It is embodied in article 8 in the second annex to the committee resolution. The change is of vital importance, but can be made without the least disturbance of the court or its jurisdiction. There is no good reason why its proposal by the United States should not meet with ready acceptance by the other powers. The committee resolution presents to the Senate in exact language the protocol and statute as they would read if amended. No room is left for misunderstanding between the Executive and the Senate. In adopting the resolution the Senate will in due form be advising and consenting to the ratification of a treaty.

THE VOTE OF THE BRITISH EMPIRE

All the other amendments specified in the resolution, with one exception, are merely incident to the severance of the legal relation between the court and the league. The exception relates to the vote of the British Empire. In the League of Nations, naturally enough, the self-governing dominions of the empire insisted upon separate and individual memberships because of the nature of the functions of the league; and, each being a member in particular, a vote in assembly and council followed as a matter of course. The resulting disparity between the United States and the British Empire was one of the reasons which led the United States to decline league membership. In the present situation there appears to the committee to be no good reason why, in the choice of future judges, the vote of the United States should not weigh as heavily as that of the British Empire and its constituent states. The League of Nations is a device for taking action in matters which may very well divide the colonial opinion of the empire. But the casting of a vote for the judge of an international court is an ideal case for the application of the theory that, in external relations, the constituent states are represented by the empire. If, however, it should develop that the units in any imperial aggregate of states are insistent upon a vote apiece, it is always possible to meet the situation by allowing the vote of the United States to count as much as all of them together.

THE MONROE DOCTRINE AND VOLUNTARY SUBMISSION

The pending resolution contains a reassertion of the Monroe doctrine and a refusal to accept the compulsory jurisdiction of the court. This latter feature is likewise included in the Swanson resolution. The Swanson resolution, upon motion of Senator Walsh, was also perfected in committee to include a disclaimer of advisory opinions.

The committee has had before it the testimony taken at open hearings held at the request of advocates of adherence to the court. This testimony discloses a widespread belief that adherence to the court by the United States will be an

important step in the direction of world peace. To the extent that this belief is well founded, it constitutes a sufficient reason for action. The committee suggests that, by many, the peacemaking value of the court is tragically exaggerated. But nobody who approves the refusal of the United States to join the League of Nations can doubt that the more complete is the severance of the court from the league, the greater becomes the effectiveness of the court as a peace organ.

THE WAY OF PEACE

If the United States should join the League of Nations, adherence to the court is at once accomplished by the terms of membership.

If the United States should not join the league, it is for reasons which make severance between court and league not merely important but essential.

The proposal of the two Presidents can be worked out in either of two ways.

By one way we perpetuate a subsisting relation between court and league and attempt to relate ourselves to one without relating ourselves to the other.

By the second way we sever once for all the relation between court and league in the interest of a sound distribution of international functions and in order that, without misgivings, and without special terms or reservations, the United States may do its utmost to promote the judicial settlement of international disputes.

This latter way the committee believes to be the way of peace.

ANNEX V

CONVENTION ON THE LIMITATION OF ARMAMENTS BETWEEN FIVE REPUBLICS OF CENTRAL AMERICA: GUATEMALA, HONDURAS, SALVADOR, NICARAGUA AND COSTA RICA

Article 1

In view of the respective population, area, length of frontier and other factors of military importance of each country, the Contracting Parties undertake, for a period of five years as from the date of the coming into force of the present Convention, not to keep under arms a permanent army and national guard greater than indicated below, except in the event of civil war or threat of war from another State:

Guatemala	5,200 men
Honduras	2,500 "
Salvador	4,200 "
Nicaragua	2,500 "
Costa Rica	2,000 "

The provisions of the present article do not apply to commanders and officers of the permanent army, who are required under the military regulations of each country, or to those of the national guard, or to the police force.

Article 2

As the primary duty of the armed forces of the Central American Governments is to maintain public order, each of the Contracting Parties undertake to establish a national guard to co-operate with the present armies in preserving order in the various districts of the respective countries and on the frontiers, and will at once consider the best means of organizing this force. For this purpose, the Governments of Central America shall consider the desirability of employing suitable instructors in order to utilize the experience acquired in other countries in organizing bodies of this kind.

The total forces of the army and of the national guard shall in no case exceed the maximum fixed in the previous article, except in the contingencies provided for in that article.

Article 3

The Contracting Parties undertake not to export or to allow the export of arms or munitions or other military stores of any kind from one Central American country to another.

Article 4

None of the Contracting Parties may possess more than ten military aircraft, or acquire vessels of war. Armed coastguard vessels shall not, however, be considered as vessels of war.

The provisions of this article shall not apply in the event of civil war or threat of war on the part of another State, in which case the right of defence shall not be limited, except in so far as is laid down in existing treaties.

Article 5

The Contracting Parties recognize that the use in time of war of asphyxiating and poisonous or similar gases, liquids or substances, or substances containing these,

is contrary to all humanitarian principles and to international law; under the present Convention, therefore, they undertake not to have recourse to these methods in time of war.

ARTICLE 6

Six months after the coming into force of the present Convention, each of the Contracting Governments shall submit to the other Central American Governments a complete report on the measures adopted in execution of the present Convention. Similar reports shall be furnished every six months during the prescribed period of five years.

The information in these reports shall refer to units of the army (if any) and of the national guard, and any other information which the Contracting Parties may consider it desirable to furnish.

ARTICLE 7

The present Convention shall apply, in respect of those Parties which have ratified it, as from the date on which it has been ratified by at least four of the signatory States.

ARTICLE 8

The present Convention shall not lapse before the first day of January nineteen hundred and twenty-nine, even if previously denounced, or for any other reason. After the first day of January nineteen hundred and twenty-nine, it shall remain in force for one year after the date on which one of the Contracting Parties has notified to the others its intentions of denouncing it. If the present Convention has been denounced by any of these Parties, it shall nevertheless remain in force in respect of the others which have ratified it and which have not denounced it, provided the latter number at least four. Any Central American Republic which has not ratified this Convention may adhere to it so long as it remains in force.

ARTICLE 9

The ratifications of the present Convention shall be exchanged by means of communications from the other Governments to the Government of Costa Rica, the latter Government then duly notifying the other Contracting States. When the Government of Costa Rica itself shall have ratified the Convention, it shall communicate the ratification to the other States.

ARTICLE 10

The original copy of the present Convention, signed by all the Plenipotentiary Delegates, shall be placed in the archives of the Pan-American Union at Washington. A certified copy shall be sent by the Secretary-General of the Conference to each of the Contracting Governments.

ANNEX VI

TEXT OF THE DRAFT TREATY OF MUTUAL ASSISTANCE

Preamble

The High Contracting Parties, being desirous of establishing the general lines of a scheme of mutual assistance with a view to facilitate the application of Articles X and XVI of the Covenant of the League of Nations, and of a reduction or limitation of national armaments in accordance with Article VIII of the Covenant "to the lowest point consistent with national safety and the enforcement by common action of international obligations," agree to the following provisions:

Article 1

The High Contracting Parties solemnly declare that aggressive war is an international crime and severally undertake that no one of them will be guilty of its commission.

A war shall not be considered as a war of aggression if waged by a State which is party to a dispute and has accepted the unanimous recommendation of the Council, the verdict of the Permanent Court of International Justice, or an arbitral award against a High Contracting Party which has not accepted it, provided, however, that the first State does not intend to violate the political independence or the territorial integrity of the High Contracting Party.

Article 2

The High Contracting Parties jointly and severally undertake to furnish assistance, in accordance with the provisions of the present Treaty, to any one of their number should the latter be the object of a war of aggression, provided that it has conformed to the provisions of the present Treaty regarding the reduction or limitation of armaments.

Article 3

In the event of one of the High Contracting Parties being of opinion that the armaments of any other High Contracting Party are in excess of the limits fixed for the latter High Contracting Party under the provisions of the present Treaty, or in the event of it having cause to apprehend an outbreak of hostilities, either on account of the aggressive policy or preparations of any State party or not to the present Treaty, it may inform the Secretary-General of the League of Nations that it is threatened with aggression, and the Secretary-General shall forthwith summon the Council.

The Council, if it is of opinion that there is reasonable ground for thinking that a menace of aggression has arisen, may take all necessary measures to remove such menace, and in particular, if the Council thinks right, those indicated in sub-paragraphs (*a*), (*b*), (*c*), (*d*) and (*e*) of the second paragraph of Article 5 of the present Treaty.

The High Contracting Parties which have been denounced and those which have stated themselves to be the object of a threat of aggression shall be considered as especially interested and shall therefore be invited to send representatives to the Council in conformity with Articles IV, XV and XVII of the Covenant. The vote of their representatives shall, however, not be reckoned when calculating unanimity.

ARTICLE 4

In the event of one or more of the High Contracting Parties becoming engaged in hostilities, the Council of the League of Nations shall decide, within four days of notification being addressed to the Secretary-General, which of the High Contracting Parties are the objects of aggression and whether they are entitled to claim the assistance provided under the Treaty.

The High Contracting Parties undertake that they will accept such a decision by the Council of the League of Nations.

The High Contracting Parties engaged in hostilities shall be regarded as especially interested, and shall therefore be invited to send representatives to the Council (within the terms of Articles IV, XV and XVII of the Covenant, the vote of their representative not being reckoned when calculating unanimity; the same shall apply to States signatory to any partial agreements involved on behalf of either of the two belligerents, unless the remaining Members of the Council shall decide otherwise.

ARTICLE 5

The High Contracting Parties undertake to furnish one another mutually with assistance in the cases referred to in Article 2 of the Treaty in the form determined by the Council of the League of Nations as the most effective, and to take all appropriate measures without delay in the order of urgency demanded by the circumstances.

In particular, the Council may:

(*a*) Decide to apply immediately to the aggressor State the economic sanctions contemplated by Article XVI of the Covenant, the Members of the League not signatory to the present Treaty not being, however, bound by this decision, except in the case where the State attacked is entitled to avail itself of the Articles of the Covenant;

(*b*) Invoke by name the High Contracting Parties whose assistance it requires. No High Contracting Party situated in a continent other than that in which operations will take place shall, in principle, be required to co-operate in military, naval or air operations;

(*c*) Determine the forces which each State furnishing assistance shall place at its disposal;

(*d*) Prescribe all necessary measures for securing priority for the communications and transport connected with the operations;

(*e*) Prepare a plan for financial co-operation among the High Contracting Parties with a view to providing for the State attacked and for the States furnishing assistance the funds which they require for the operations;

(*f*) Appoint the Higher Command and establish the object and the nature of his duty.

The representatives of States recognized as aggressors under the provisions of Article 4 of the Treaty shall not take part in the deliberations of the Council specified in this Article. The High Contracting Parties which are required by the Council to furnish assistance, in accordance with sub-paragraph (*b*), shall, on the other hand, be considered as especially interested, and, as such, shall be invited to send representatives, unless they are already represented, to the deliberations specified in sub-paragraphs (*c*), (*d*), (*e*) and (*f*).

ARTICLE 6

For the purpose of rendering the general assistance mentioned in Articles 2, 3 and 5 immediately effective, the High Contracting Parties may conclude, either as between two of them or as between a larger number, agreements complementary to the present Treaty exclusively for the purpose of their mutual defence and

intended solely to facilitate the carrying out of the measures prescribed in this Treaty, determining in advance the assistance which they would give to each other in the event of any act of aggression.

Such agreements may, if the High Contracting Parties interested so desire, be negotiated and concluded under the auspices of the League of Nations.

ARTICLE 7

Complementary agreements, as defined in Article 6, shall, before being registered, be examined by the Council with a view to deciding whether they are in accordance with the principles of their Treaty and of the Covenant.

In particular, the Council shall consider if the cases of aggression contemplated in these agreements come within the scope of Article 2 and are of a nature to give rise to an obligation to give assistance on the part of the other High Contracting Parties. The Council may, if necessary, suggest changes in the texts of agreements submitted to it.

When recognized, the agreements shall be registered in conformity with Article XVIII of the Covenant. They shall be regarded as complementary to the present Treaty, and shall in no way limit the general obligations of the High Contracting Parties nor the sections contemplated against the aggressor State under the terms of this Treaty.

They will be open to any other High Contracting Party with the consent of the signatory States.

ARTICLE 8

The States parties to complementary agreements may undertake in any such agreements to put into immediate execution, in the cases of aggression contemplated in them, the plan of assistance agreed upon. In this case they shall inform the Council of the League of Nations, without delay, concerning the measures which they have taken to ensure the execution of such agreements.

Subject to the terms of the previous paragraph, the provisions of Articles 4 and 5 above shall also come into force both in the cases contemplated in the complementary agreements and in such other cases as are provided for in Article 2 but are not covered by the agreement.

ARTICLE 9

In order to facilitate the application of the present Treaty, any High Contracting Party may negotiate, through the agency of the Council, with one or more neighboring countries for the establishment of demilitarized zones.

The Council, with the co-operation of the representatives of the Parties interested, acting as Members within the terms of Article IV of the Covenant, shall previously ensure that the establishment of the demilitarized zone asked for does not call for unilateral sacrifices from the military point of view on the part of the High Contracting Parties interested.

ARTICLE 10

The High Contracting Parties agree that the whole cost of any military, naval or air operations which are undertaken under the terms of the present Treaty and of the supplementary partial agreements, including the reparation of all material damage caused by operations of war, shall be borne by the aggressor State up to the extreme limits of its financial capacity.

The amount payable under this Article by the aggressor shall, to such an extent as may be determined by the Council of the League, be a first charge on the whole of the assets and revenues of the State. Any repayment by that

State in respect of the principal money and interest of any loan, internal or external, issued by it directly or indirectly during the war shall be suspended until the amount due for cost and reparations is discharged in full.

ARTICLE 11

The High Contracting Parties, in view of the security furnished them by this Treaty and the limitations to which they have consented in other international treaties, undertake to inform the Council of the League of the reduction or limitation of armaments which they consider proportionate to the security furnished by the general Treaty or by the defensive agreements complementary to the general Treaty.

The High Contracting Parties undertake to co-operate in the preparation of any general plan of reduction of armaments which the Council of the League of Nations, taking into account the information provided by the High Contracting Parties, may propose under the terms of Article VIII of the Covenant.

This plan should be submitted for consideration and approved by the Governments, and, when approved by them, will be the basis of the reduction contemplated in Article 2 of this Treaty.

The High Contracting Parties undertake to carry out this reduction within a period of two years from the date of the adoption of this plan.

The High Contracting Parties undertake, in accordance with the provisions of Article VIII, paragraph 4, of the Covenant, to make no further increase in their armaments, when thus reduced, without the consent of the Council.

ARTICLE 12

The High Contracting Parties undertake to furnish to the military or other delegates of the League such information with regard to their armaments as the Council may request.

ARTICLE 13

The High Contracting Parties agree that the armaments determined for each of them, in accordance with the present Treaty, shall be subject to revision every five years, beginning from the date of the entry into force of this Treaty.

ARTICLE 14

Nothing in the present Treaty shall affect the rights and obligations resulting from the provisions of the Covenant of the League of Nations or of the Treaties of Peace signed in 1919 and 1920 at Versailles, Neuilly, Saint-Germain and Trianon, or from the provisions of treaties or agreements registered with the League of Nations and published by it at the date of the first coming into force of the present Treaty as regards the signatory or beneficiary Powers of the said Treaties or agreements.

ARTICLE 15

The High Contracting Parties recognize from to-day as *ipso facto* obligatory, the jurisdiction of the Permanent Court of International Justice with regard to the interpretation of the present Treaty.

ARTICLE 16

The present Treaty shall remain open for the signature of all States Members of the League of Nations or mentioned in the Annex to the Covenant.

States not Members shall be entitled to adhere with the consent of two-thirds of the High Contracting Parties with regard to whom the Treaty has come into force.

ARTICLE 17

Any State may, with the consent of the Council of the League, notify its conditional or partial adherence to the provisions of this Treaty, provided always that such State has reduced or is prepared to reduce its armaments in conformity with the provisions of this Treaty.

ARTICLE 18

The present Treaty shall be ratified and the instruments of ratification shall be deposited as soon as possible at the Secretariat of the League of Nations.

It shall come into force:

In Europe when it shall have been ratified by five States, of which three shall be permanently represented on the Council;

In Asia when it shall have been ratified by two States, one of which shall be permanently represented on the Council;

In North America when ratified by the United States of America;

In Central America and the West Indies when ratified by one State in the West Indies and two in Central America;

In South America when ratified by four States;

In Africa and Oceania when ratified by two States.

With regard to the High Contracting Parties which may subsequently ratify the Treaty, it will come into force at the date of the deposit of the instrument.

The Secretariat will immediately communicate a certified copy of the instruments of ratification received to all the signatory Powers.

It remains understood that the rights stipulated under Articles 2, 3, 5, 6 and 8 of this Treaty will not come into force for each High Contracting Party until the Council has certified that the said High Contracting Party has reduced its armaments in conformity with the present Treaty or has adopted the necessary measures to ensure the execution of this reduction within two years of the acceptance by the said High Contracting Party of the plan of reduction or limitation of armaments.

ARTICLE 19

The present Treaty shall remain in force for a period of fifteen years from the date of its first entry into force.

After this period, it will be prolonged automatically for the States which have not denounced it.

If, however, one of the States referred to in Article 18 denounces the present Treaty, the Treaty shall cease to exist as from the date on which denunciation takes effect.

The denunciation shall be made to the Secretariat of the League of Nations, which shall, without delay, notify all the Powers bound by the present Treaty.

The denunciation shall take effect twelve months after the date on which notification has been communicated to the Secretariat of the League of Nations.

When the period of fifteen years, referred to in the first paragraph of the present Article, has elapsed, or when one of the denunciations made in the conditions determined above takes place, if operations undertaken in application of Article 5 of the present Treaty are in progress, the Treaty shall remain in force until peace has been completely re-established.

ANNEX VII

HYPOTHETICAL CASES WHICH MAY ARISE UNDER THE APPLICATION OF THE COVENANT, THE DRAFT TREATY OF MUTUAL ASSISTANCE, COMPLEMENTARY AGREEMENTS, PRIORITY TREATIES AND DEMILITARIZED ZONES—CONSTITUTING THE PROPOSED SYSTEM OF SECURITY AND DISARMAMENT OF THE LEAGUE OF NATIONS

I

A is a member of the League but not a signatory to the Treaty of Assistance. B is a signatory to the Treaty and a member of the League. A submits a dispute with B to the Council for enquiry under Article 15 of the Covenant. The Council is unable to reach a unanimous agreement and makes a report, thus setting free the right of member states to take such action as they see fit. A opens hostilities upon B; B requests the Council to intervene under the Treaty on the ground that it is the object of aggression. A claims that it is exercising a right reserved to it by the Covenant. Is A committing aggressive warfare upon B, and, if so, upon what principle of law, not being a signatory to the instrument invoked against it?

II

A and B are signatories to the Treaty. A opens hostilities on B which defends itself as best it can and appeals to the Council, alleging that it is the object of aggression. The Council meets on September 12th, but is unable to render a decision until September 18th. On September 17th, A bombards a city in the state of B. The Council renders a decision on the 18th declaring B to be an object of aggression, and invokes the High Contracting Parties to render assistance. Thereupon A withdraws and B demands reparations for damages to the city razed on September 17th. A alleges that the Council, not having rendered its decision within the time specified in the Treaty, is responsible for the damage thus done. Under these conditions can B recover damages from A? What, if any liability, attaches to the Council for failure to reach a decision within the prescribed time?

III

A and B are members of the Council and signatory to the Treaty. Hostilities break out between them. B alleges that it is the object of aggression and the Council meets to determine the matter. It is found that A has a treaty with C and D, also members of the Council, which debars them from voting under Article 4 of the Treaty; and that B has a treaty with E, another member of the Council which debars the latter from voting. The remaining five members on the Council decide that B was not the object of aggression, and assess reparations against A. A contends that a unanimous vote must consist of at least a majority and declines to pay on the ground that these five members had the right to authorize a majority to vote which they do not exercise. What is the next step for the Council to take?

IV

A and B and C, signatories to the Treaty of Assistance, conclude a special treaty for mutual defense which binds them, in the event that any one of them is

attacked, to make war on the aggressor. Hostilities open between A and D, a neighboring state and also a signatory. B and C immediately rush supplies and ammunition and detachments to the assistance of A, on the theory that it is the object of aggression. D appeals to the Council, alleging that it is the object of aggression. The Council decides that D is the object of aggression and requests the High Contracting Parties including B and C, to render mutual assistance to D. B and C protest that they are bound by special treaties, signed prior to the ratification of the Draft Treaty, and they continue their support of A. Will the General or Special Treaty take precedence? And what steps may the Council take to require observance of the former?

V

A and B are signatories to the General Treaty. They have signed a special treaty to come to the assistance of each other in case of aggression. C, also a signatory, mobilizes its economic resources and creates apprehension that it is about to attack B. An act occurs which B construes to be an intent to aggress. B complains to the Council, but, in the meantime, A and B, in accordance with their agreement, open hostilities on C. The Council ascertains that C was not a prospective aggressor against B, but was mobilizing for a defense against D, a member of the League but not a signatory to the Treaty. The Council thereupon recommends that hostilities entered into by A and B with C cease. A accepts the decision but B refuses because it also has a special treaty to come to the assistance of D, the real object of aggression. In the event of war between C and D to whom will A and B render assistance in the event that C is declared the aggressor; and what general assistance may the Council claim from each?

VI

A and B enter into an agreement before they become signatories to the General Treaty, agreeing to remain neutral in the event of either being engaged in aggressive warfare. A mobilizes for an attack upon C; also a signatory to the Treaty. C appeals to the Council. The Council finds A guilty of an aggression and decides to grant C assistance. In order for that assistance to reach C immediately, it must pass through the territory of B. The Council requests permission for the troops to pass through the territory of B. B sets up that, under Article 16 of the Treaty of Assistance the agreement guaranteeing neutrality has been recognized as valid under the General Treaty and refuses permission. Is B right, and what may the Council do to relieve C?

VII

A, B and C, signatories to the Treaty, thereby agree to render assistance to each other; C has a special treaty with D, a neighboring state, a member of the League but not a signatory to the Treaty. A and D have a dispute and begin hostilities. A appeals to the Council for assistance particularly from B and C, neighboring states which can furnish assistance immediately. D claims the assistance of B under Article 10 of the Covenant and of C under its special treaty. Will the Council proceed under the Covenant or under the Treaty? In the event of the latter is its decision binding upon D not a signatory? In the event of D being declared the aggressor, may B plead Article 16 of the Covenant in order to assist D or will it be held to the Treaty to assist A; will C be held to the Treaty or may it plead its special agreement with D? In the event of D, the declared aggressor, being the victor, may it refuse to pay reparation to B on the ground that the Covenant upon which it relied was violated; and to C on the ground that it failed to keep its agreement?

VIII

X, a signatory to the Treaty and Y, a signatory to the Covenant, have a dispute and open hostilities on each other, each claiming to have acted in self defense. X appeals to the League to adjudge Y the aggressor and to render mutual assistance on the ground that the Treaty, being a supplement to enforce Articles 10 and 16 of the Covenant as stated in the Preamble, is binding upon Y. Y alleges that any appeal to the Council should be taken by X under Article 15 of the Covenant as that alone is binding upon X. In accordance with which instrument should mutual assistance be given? (a) Article 1 under which the Council may *recommend* action; or (b) under Articles 4 and 5 of the Treaty which *authorizes* the Council to *fix* guilt and *select states to act*.

IX

A and B begin hostilities. A calls to its assistance C and D with whom it has a complementary treaty. B appeals to the Council. The Council decides that A is the aggressor and not entitled to the assistance of C and D and orders all mutual assistance to cease. A prevails upon C to continue its support but D obeys the Council. Should the Council order D, a party to the complementary treaty, to attack A and C who are still at war, and particularly C which has disobeyed the Council's orders, but with whom D has an agreement?

X

A has a dispute with B, a non-member state. B opens hostilities and A, a signatory to the Treaty and member of the League, appeals to the Council which decides that B is the aggressor. C, D and E are selected to render assistance to A. C refuses on the ground that B is not a party to the Treaty and that it will not make war on a state not represented when the decision was taken. D refuses on the ground that the Council should proceed under Article 17 of the Covenant and E refuses on the ground that it has a secret treaty of neutrality with B. What rights has the Council, and what rights, if any, has A against C, D and E? Is the secret treaty, not having been registered, binding as between E and B, or only between E and the Council?

XI

A has entered into a general agreement to reduce its armaments and is proceeding with its plans but has not actually effected a reduction when it engages in hostilities with B. A requests assistance from the Council, and B is alleged to be the aggressor. C is asked to furnish men and munitions but refuses on the ground that A has not conformed to the Treaty in that it has not reduced its armament. What may the Council do?

XII

A and B are signatories to the Treaty. C, an Allied Power, is also signatory but with the reservation that its Parliament must approve of any proposal to furnish troops or military equipment. A and D enter into hostilities. D complains to the Council and A is declared the aggressor. The Council then requests C to furnish assistance to D. The Parliament of C, exercising its right, refuses and D loses the war. In the following year C and F are engaged in hostilities, in which F is declared the aggressor. The Council orders assistance to C, among them being the state of D, a neighbor and highly essential to effective assistance. D refuses on the ground of lack of reciprocity and inability

to muster its forces on behalf of a state whose previous action caused it to lose the war. C requests the Council to treat D as an aggressor with F in refusing assistance. What action may the Council take?

XIII

A has reduced armaments in accordance with a general plan of reduction on the basis of the equipment of B, a state with a high equipment of men and arms, and C, neighboring states, relying upon them for assistance in the event of war. At the close of six months B denounces the Treaty and is to withdraw. A immediately applies to the Council for an increase in armaments but on the Council is a member opposed to A becoming any stronger in armaments and the request is denied. A, being thus weakened, is attacked by D, a non-member state, immediately the denouncement of B becomes effective. A immediately applies to the Council for assistance from B under Article 10 of the Covenant. What position will the Council take?

XIV

A and B, signatories to the Treaty, have a complementary agreement to furnish assistance against C, also a signatory. A schedule for the reduction of armaments has been approved but before it is completed by A, it is attacked by C and calls upon B to put into execution the terms of its treaty. B finds difficulty in securing popular consent to furnishing the assistance required, appeals to the Council, stating that inasmuch as A has not complied with the reduction of armaments, Article 2 is applicable to Article 9 under which the complementary treaty is negotiated. Are the precise relations between the provisions of Article 2 and Article 9 such as to justify the action of B?

XV

A and B, signatories to the Treaty, enter into a complementary treaty against C which is recognized by the Council. C, another signatory, is suspected of mobilizing against A, whereupon A calls upon B to put into operation the terms of the complementary treaty. But C is a very powerful adversary with whom B does not wish to make war. Instead B appeals to the Council for a decision concerning the intentions of C on the ground that the Treaty is permissive and it is entitled to wait for such opinion. In the meantime, the Council is unable to reach a unanimous decision within four days and A begins an offensive in its own defense and suffers reverses. Was B entitled to wait for the decision of the Council or was it under obligation to put its defensive treaty with A into effect at once?

XVI

A and B are neighboring states and are signatories to the Treaty of Disarmament and Security. They have a defensive alliance against C, also a signatory. C increases its industrial organization. A brings a complaint to the Court under Article 4, while B takes the matter to the Council under Article 25 alleging in each instance that they fear a menace of aggression from C. The Court and Council disagree. The former finds no justification at law for believing that C is mobilizing its industrial resources for war; while the Council finds as a result of the reports of its commission, that such is the case. Acting on the opinion of the Council, A and B put into operation their defensive alliance and attack C whereupon C seeks to bring them into Court as aggressors. But A and B set up that they are justified under Article 25. What is the legal position of the parties under the Treaty?

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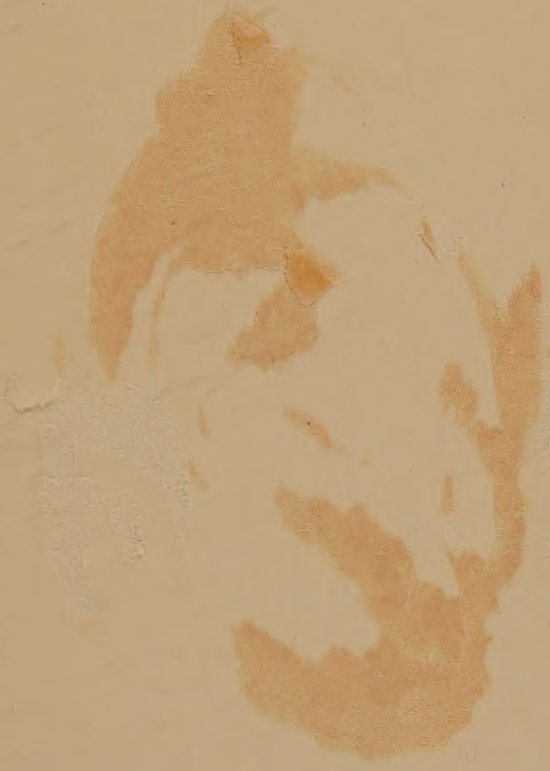

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